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INTRODUCTION

In light of increasing incidents of child abuse[1] and media[2] coverage of legal proceedings, consider the following scenario: During a high profile trial involving the sexual abuse of several young children, the prosecutor requests closure of the courtroom arguing that the child victim-witnesses are intimidated and may refuse to testify if the courtroom is full of spectators. Moreover, the child victim-witnesses may be emotionally traumatized if the courtroom remains open to the public. However, the defendant objects, based on a Sixth Amendment right to have the public present to observe the children's accusations. The media objects, arguing on behalf of itself and the public, that it has a First Amendment right to attend, observe and report on information gathered at the trial. The question is: Whose interests should prevail?

Alternatively, imagine a child custody proceeding involving parents who are public figures. An attorney representing the child's interests requests closing the courtroom, contending that the child should be protected from the pressures of an open trial and the resulting media coverage. Once again, the media objects, asserting its First Amendment rights. Here too, the question is: Whose interests should prevail?

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1. *See infra* notes 210-214 and accompanying text.

2. "Media" will be used to refer to both the print media, i.e., newspapers and magazines, and television media, i.e., media involving cameras that televise or broadcast information. "Television media" and "print media" will be used to refer to either individually.

In recent years the United States Supreme Court has considered a number of cases in which it balanced the rights and interests of the media against those of other trial participants, establishing a right on behalf of the media to attend and report on legal proceedings.[3] But, the Court has not granted the television media the right to televise legal proceedings. However, most states have statutes permitting cameras in the courtroom and the federal courts continue to evaluate the prudence and advantages of televised legal proceedings.[4]

The television media's access to legal proceedings has generated concerns regarding whether limits should be placed on televised trials.[5] Recently, trials, such as the O.J. Simpson, the Me-

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3. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980); Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976). *See also* G. Michael Fenner & James L. Koley, *Access to Judicial Proceedings: To* Richmond Newspapers *and Beyond*, 16 HARV. C.R.-C.L. L. REV. 415, 415 (1982); David N. Kuriyama, Note, *The "Right" of Information Triangle: A First Amendment Basis for Televising Judicial Proceedings*, 4 U. HAW. L. REV. 85, 109-10 (1982); *infra* Part II.A. The only remaining controversial area, with respect to the media's right to publish information accessed while at a legal proceeding, is whether the media may publish or broadcast the names of victims of sexual assault or other sexual abuse. *See infra* note 228.

4. Federal courts continue to debate the presence of cameras during civil proceedings. In criminal cases, Rule 53 of the Federal Rules of Criminal Procedure bars television cameras from the courtroom—"The taking of photographs in the court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the courtroom shall not be permitted by the court." FED. R. CRIM. P. 53. In December 1994, the federal judiciary ended a three-year broadcasting experiment. *See* Henry J. Reske, *A Repeat Performance*, A.B.A. J., May 1996, at 38; *see generally* Henry J. Reske, *Rally for Court Cameras Falls Short*, A.B.A. J., Mar. 1995, at 30; J. Stratton Shartel, *Cameras in the Courts: Early Returns Show Few Side Effects*, 7 INSIDE LITIG. 1 (1993) (explaining experiments in the Second and Ninth Circuits with cameras in the courtroom); Deborah Squiers, *Southern District Judges Vote to Try Cameras*, N.Y. L.J., Sept. 28, 1990, at 1. In March 1996, the United States Judicial Conference voted 14-12 to allow the federal appeals courts to permit television, radio and still photography to cover appellate proceedings, however, they urged each circuit to bar the broadcasting of district court proceedings. Reske, *A Repeat Performance*, *supra*.

The Second Circuit has refused to eliminate local rules permitting television coverage of civil legal proceedings. Deborah Pines, *Circuit Council Leaves Camera Rule Intact*, N.Y. L.J., June 14, 1996, at 1. For example, Local Rule 1.8 in the Southern District of New York permits cameras in the courtroom at the court's discretion. *Id.* Pursuant to this rule, at least two judges have allowed cameras in their courtrooms during civil proceedings. *See* Marisol v. Giuliani, 929 F. Supp. 660 (S.D.N.Y. 1996); Katzman v. Victoria's Secret Catalogue, 923 F. Supp. 580 (S.D.N.Y. 1996). In the Eastern District of New York, which is governed by the same Local Rule, at least one judge has permitted cameras in the courtroom. *See* Daniel Wise, *Judge Defies Federal Policy on Cameras*, N.Y. L.J., Oct. 22, 1996, at 1.

5. *See, e.g.*, Robert G. Morvillo, *Television and the Public Trial*, N.Y. L.J., Apr. 1, 1997, at 3; *Gag Order Over Simpson Reflects Shift in Attitude*, N.Y. TIMES, Aug. 26,

nendez brothers, and the Nanny Woodward trials brought this issue once again to the attention of both legal scholars and the public. Swift technological advancements, combined with heightened public interest in legal proceedings,[6] subjects increasing numbers of people to televised legal proceedings. These technological advancements and heightened public interest require lawmakers to continuously reevaluate[7] how the media affects the legal process, particularly those proceedings that involve children.[8]

Before turning to the essence of this Article, it is necessary to set the stage, which includes a discussion of the history of public trials and the media's access to legal proceedings. Accordingly, Part I briefly outlines the history of public trials, their role in the judicial system, circumstances under which courtrooms have been closed and the present landscape of statutes permitting closure. Part I also discusses a criminal defendant's rights implicated by a closed legal proceeding. Because a defendant's rights and concerns are constitutionally protected, they must be balanced not only with the media's and the public's First Amendment rights but also with a child victim-witness's interests and a state's rights on behalf of the child victim-witness.

1996, at A7; James C. Goodale, *Cameras, the Courts and the Missing "Simpson" Backlash*, N.Y. L.J., Aug. 2, 1996, at 3; Steven Keeva, *Circus-Like Trial Colors Expectation*, A.B.A. J., Nov. 1995, at 48c; Henry J. Reske, *Courtroom Cameras Fail New Scrutiny*, A.B.A. J., Nov. 1995, at 48d.

6. For example, the Court Television Network ("Court TV"), launched on July 1, 1991, can now be seen in 14.1 million homes. The network broadcasts trials from all over the country and provides commentary. Televised trials include the widely publicized William Kennedy Smith rape trial, the Menendez brothers murder trial, both Bobbitt trials, the Louise Woodward Nanny Murder trial, the Bernie Goetz civil trial, the Kevorkian trials, and the O.J. Simpson trial. In October 1993, Court TV ranked fourth on the Nielsen ratings during the day for viewers who receive the channel. Massimo Calabresi, *Swaying the Home Jury*, TIME, Jan. 10, 1994, at 56; *See generally* Shartel, *supra* note 4; *see also Court TV Website*, Feb. 1, 1998, <http://www.courtly.com/about/ctvfaq.html>.

7. *See Today's News: Update*, N.Y. L.J., Aug. 27, 1996, at 1. At least one state, New York, reevaluated the use of cameras in the courtroom. *Id.* Governor Pataki assembled a committee to examine the impact of cameras in the courtroom. *Id.* Although the committee recommended allowing the state courts to continue to permit televised action, Daniel Wise, *Report Favors TV Cameras in Court*, N.Y. L.J., Apr. 4, 1997, at 1, the new bill died in the state senate. Gary Spencer, *Effort on Cameras in Court Dies*, N.Y. L.J., July 16, 1997, at 1. The statute having lapsed leaves cameras without access to New York State courts. *Id.*

8. Heightened awareness may cause more people to seek out and watch legal proceedings. In a race to provide coverage, the media becomes focused on reporting legal proceedings, regardless of whether children are involved.

Part II examines the current legal landscape of the media's rights, including the impact of *Globe Newspaper Co. v. Superior Court*, a seminal case that balanced the media's rights with a state's interest in protecting children.[9] Part II also discusses the effects and consequences of cameras in the courtroom, beginning with a look at two instances in which the United States Supreme Court has addressed the issue—*Estes v. Texas*[10] and *Chandler v. Florida*.[11]

Finally, Part III explores the role of, and potential harm to, the child victim-witness during legal proceedings as the trial participant most likely to suffer psychological trauma from an open legal proceeding.[12] Part III also discusses the disadvantages of alternatives to closure, concluding that the interests of the state and child are better served by closed courtrooms.

This Article suggests that, even though the current state of the law makes it difficult to bar the media from a courtroom, the media should be barred under certain circumstances, particularly during a child's testimony in criminal cases and during child custody proceedings. Furthermore, this Article recommends that a child's testimony should never be televised.

I. HISTORICAL DEVELOPMENT AND CHARACTERISTICS OF OPEN TRIALS

A. *Historical Development*[13]

Before the Norman Conquests in England, trials were mandatorily attended by the "freemen" who rendered verdicts.[14] As the jury system developed, attendance was no longer mandatory, but trials remained open.[15] Open trials continued in the United States, as is evidenced in the early documents of Vir-

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9. 457 U.S. 596 (1982).

10. 381 U.S. 532 (1965).

11. 449 U.S. 560 (1981).

12. *See infra* notes 215-221 and accompanying text.

13. For a more extended history of public trials see Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 564-73 (1980); *In re* Oliver, 333 U.S. 257, 266-72 (1948); *see also* Max Radin, Note, *The Right to a Public Trial*, 6 TEMP. L.Q. 381 (1932); Ruth Ann Strickland & Richter H. Moore, Jr., *Cameras in State Courts: A Historical Perspective*, JUDICATURE, Nov.-Dec. 1994, at 128-35, 160.

14. *Richmond*, 448 U.S. at 565 (citing Pollack, *English Law Before the Norman Conquest*, *in* 1 SELECT ESSAYS IN ANGLO-AMERICAN HISTORY 88, 89 (1907)); Jack B. Harrison, Note, *How Open is Open? The Development of the Public Access Doctrine Under State Open Court Provisions*, 60 U. CINN. L. REV. 1307, 1308 (1992).

15. *Richmond*, 448 U.S. at 565; Harrison, *supra* note 14, at 1308.

ginia, New Jersey and Pennsylvania.[16] The doctrine of open trials was then incorporated into the Bill of Rights of the United States Constitution—the Sixth Amendment reads, in pertinent part, "The accused shall enjoy the right to a . . . public trial."[17]

One historical motivation offered for the presumption of openness in criminal trials is the unjust treatment of the accused in the seventeenth and eighteenth centuries in many European countries. For example, the Star Chamber in England obtained confessions from defendants through torture during secret proceedings, in which they were not permitted to confront the witnesses testifying against them.[18] In France there were *lettres de cachet* that were issued by the king and "order[ed] the indefinite imprisonment of any particular person."[19] The abuses of the Spanish Inquisition also gave "an odor of sanctity" to public trials.[20] These practices and events may have demonstrated that open trials were necessary in order to guarantee fair, just trials.[21]

Although it is unclear precisely how the presumption of openness developed, the criminal trial has been open to the press and general public since the birth of our country's legal system,[22] and the United States Supreme Court has upheld this principle.[23]

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16. *Richmond*, 448 U.S. at 567-68; Gannett Co. v. DePasquale, 443 U.S. 368, 386 n.15 (1979).

17. U.S. CONST. amend. VI.

18. *See Gannett*, 443 U.S. at 387 n.18; *In re* Oliver, 333 U.S. 257, 267-69 & n.22 (1948); William John Zak, Jr., Note, *Sixth Amendment Issues Posed by the Court-Martial of Clayton Lonetree*, 30 AM. CRIM. L. REV. 187, 192 (1992).

19. Radin, *supra* note 13, at 388; *see also Oliver*, 333 U.S. at 268-69 & n.23; Zak, *supra* note 18.

20. Radin, *supra* note 13, at 389; *see also Oliver*, 333 U.S. at 268; Zak, *supra* note 18.

21. Alternatively, one author suggests, that the Star Chamber may have been abolished to stop the tortuous treatment rather than to prevent secret trials. Radin, *supra* note 13, at 386-87.

22. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 605 (1982). *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 564-73 (1980); Gannett, 443 U.S. at 385, 386 n.15 ("There is no question that the Sixth Amendment permits and even presumes open trials as a norm."); *Oliver*, 333 U.S. at 266-72; *see also* Note, *The Right to a Public Trial in Criminal Cases*, 41 N.Y.U. L. REV. 1138, 1138-39 (1966) [hereinafter NYU Note]; Radin, *supra*, note 13.

23. *Globe*, 457 U.S. at 605; *Richmond*, 448 U.S. at 569, 573 n.9. *See also* Radin, *supra* note 13, at 389. Radin states that the presumption of an open trial has "found formulation as a constitutional right in almost every state, and in the United States Constitution." *Id.*

1. *Exceptions to the Presumption of Openness.* Despite this long standing presumption of openness, trials have been closed to the public under certain circumstances.[24] For example, during trials involving the testimony of undercover police officers,[25] informants[26] or witnesses who fear for their safety.[27] A judge also may close a courtroom if necessary to ensure a fair trial for the defendant,[28] to prevent overcrowding[29] or to quell courtroom disturbances.[30] Moreover, many trials involving sex crimes and children were closed to the public.[31] In fact, many states con-

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24. *See* John C. Hearn, Note, *Globe Newspaper: Sounding the Death Knell for Closure in Courtroom Proceedings?*, 3 PACE L. REV. 395, 399 (1983) (discussing exceptions involving undercover agents and witnesses needing protection); NYU Note, *supra* note 22, at 1144-46.

25. *See, e.g.*, Ayala v. Speckard, 131 F.3d 62 (2d Cir. 1997) (analyzing state court decisions to close courtrooms during testimony of undercover officers); Peterson v. Williams, 85 F.3d 39 (2d Cir. 1996); United States *ex rel.* Lloyd v. Vincent, 520 F.2d 1272 (2d Cir. 1975); People v. Richard Sheppard, N.Y. L.J., Apr. 12, 1996, at 26 (decision of Supreme Court Judge Thompkins). *Cf.* Vidal v. Williams, 31 F.3d 67 (2d Cir. 1994).

26. *See, e.g.*, United States v. Hernandez, 608 F.2d 741 (9th Cir. 1979).

27. *See, e.g.*, United States v. Doe, 63 F.3d 121 (2d Cir. 1995); Woods v. Kuhlmann, 977 F.2d 74 (2d Cir. 1992); Nieto v. Sullivan, 879 F.2d 743 (10th Cir. 1989); United States *ex rel.* Bruno v. Herold, 408 F.2d 125 (2d Cir. 1969); United States *ex rel.* Orlando v. Fay, 350 F.2d 967 (2d Cir. 1965); People v. Hagan, 24 N.Y.2d 395 (1969); NYU Note, *supra* note 22, at 1145 & n.55; Matthew Goldstein, *Judge's Exclusion of Group from Courtroom Allowed*, N.Y. L.J., Apr. 11, 1997, at 1 (discussing People v. Hok Ming Chan (N.Y. App. Div. 1st Dep't 1997)). *But see* Guzman v. Scully, 80 F.3d 772 (2d Cir. 1996).

28. NYU Note, *supra* note 22, at 1144-45.

29. *Id.*; *see also* A BACKGROUND REPORT PREPARED FOR AND PRESENTED TO THE SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE COMM. ON THE JUDICIARY UNITED STATES SENATE, 94TH CONG., 2d SESS., FAIR TRIAL AND FREE EXPRESSION 24 (Comm. Print 1976); Hearn, *supra* note 24, at 399; Radin, *supra* note 13, at 390.

30. *See* Cosentino v. Kelly, 102 F.3d 71 (2d Cir. 1996); Ostolaza v. Warden, 603 A.2d 768 (Conn. App. 1992); *Retrial's Closure Held No Basis for Habeas*, N.Y. L.J., May 14, 1996, at 1 (discussing Magana v. Kelly, 95 Civ. 3388 (S.D.N.Y. May 10, 1996)).

31. *See generally* Globe Newspaper Co. v. Superior Court, 457 U.S. 569, 614 (1982) (Burger, J., dissenting); *see, e.g.*, United States *ex rel.* Latimore v. Sielaff, 561 F.2d 691 (7th Cir. 1977); Harris v. Stephens, 361 F.2d 888 (8th Cir. 1966) (the court observed that closing the courtroom during the testimony of a rape victim is a "frequent and accepted practice"); Melanson v. O'Brien, 191 F.2d 963 (1st Cir. 1951); Callahan v. United States, 240 F. 683 (9th Cir. 1917); Reagan v. United States, 202 F. 488, 490 (9th Cir. 1913) (the court emphasized that a rape victim should not be forced to testify in front of a "crowd of idle, gaping loafers, whose morbid curiosity would lead them to attend such a trial"); United States v. Greise, 158 F. Supp. 821, 824 (D. Ala. 1958) (the court stated that a trial judge may exclude members of the public in a criminal trial, "in order to protect a witness from embarrassment by reason of having to testify to delicate or revolting facts, as a child . . . ."); *aff'd*, 262 F.2d 151 (9th Cir. 1958); State v. Smith, 599 P.2d 199 (Ariz. 1979); Hogan v. State, 86 S.W.2d 931 (Ark. 1935) (the court permitted closure where it was apparent that the victim was "terribly frightened and embarrassed to have to go upon the witness stand in the presence of a courtroom crowded with people . . . ."); State v. Purvis, 251 A.2d 178, 182 (Conn. 1968) (the court concluded that the "temporary and

tinue to permit closure during legal proceedings involving children or sex crimes.[32] This fact was largely ignored by the United

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limited exclusion of the general public," during the minor's testimony was permissible); Moore v. State, 108 S.E. 47 (Ga. 1921) (the court observed that when it appears to the court that the victim, "on account of her youth and highly nervous condition, is unable to give her testimony before a crowd of spectators . . . the trial judge may clear the courtroom"); Beauchamp v. Cahill, 180 S.W.2d 423 (Ky. 1944); People v. Latimore, 342 N.E.2d 209 (Ill. App. 1975); Commonwealth v. Hobbs, 434 N.E.2d 633 (Mass. 1982); Commonwealth v. Blondin, 87 N.E.2d 455 (Mass. 1949); State v. Guajardo, 605 A.2d 217 (N.H. 1992); State v. Workman, 14 Ohio App. 3d 385, 471 N.E.2d 853 (Ohio App. 1984); State v. Santos, 122 R.I. 799, 413 A.2d 58 (R.I. 1980); State v. Damm, 252 N.W. 7 (S.D. 1933); Mosby v. State, 703 S.W.2d 714 (Tex. App. 1985); Grimmett v. State, 2 S.W. 631 (Tex. App. 1886); State v. Rusin, 568 A.2d 403 (Vt. 1989) (list of cases cited in Frumkin, *infra* note 217, at 658-59 & n.163); *see also* Benjamin S. Duval, Jr., *The Occasions of Secrecy*, 47 U. PITT. L. REV. 579, 646 (1986) ("a second exception to the norm of openness in judicial proceedings involves sex offenses"); NYU Note, *supra* note 22, at 1145 & n.53; Radin, *supra* note 13, at 385, 389-90 & n.13.

32. Most of the statutes provide that a court, in its discretion, may close a courtroom when a child or a victim of a sex crime is testifying. Sometimes the statutes require a showing that closure will reduce psychological damage. *See, e.g.*, CAL. PENAL CODE § 868.7 (West 1996) (mentioning nervousness and embarrassment); ARIZ. REV. STAT. R. CRIM. PROC. 9.3, (discussing trauma of the victim). The following is a list of the state statutes:

ALA. CODE § 12-21-202 (1995) (applies to sex crimes and defendant's consent required); ALASKA STAT. § 25.20.120 (Michie 1995) (pertains to child custody hearings); ARIZ. REV. STAT. R. CRIM. PROC. 9.3 (to prevent embarrassment or emotional disturbance); ARK. CODE ANN. § 16-85-204 (Michie 1995) (defendant can request closure); CAL. PENAL CODE § 868.7 (West 1996) (minors, victims of sex crimes or to prevent loss of life); CONN. GEN. STAT. ANN. § 46b-11 (West 1996) (pertains to family matters or welfare of children); FLA. STAT. ANN. § 918.16 (West 1996) (closure for sexual crimes and children under 16, except as to the media); GA. CODE ANN. §§ 17-8-53 to 17-8-54 (1996) (§ 53 pertains to vulgar facts; § 54 pertains to children under 16 and excepts the media); 725 ILL. COMP. STAT. ANN. § 5/115-11 (West 1996) (closure for children under 18, except as to the media); IOWA CODE ANN. § 813.2, Rule 2(4)(d) (West 1996) (closure upon defendant's request); IOWA CODE ANN. § 232.92 (West 1996) (closure for juveniles); KAN. STAT. ANN. § 38-1552 (1995) (exclusion upon consent in adjudicatory proceedings involving children); LA. REV. STAT. ANN. § 15:469.1 (West 1996) (sex crimes and children under 15); ME. REV. STAT. ANN. tit. 15, § 457 (West 1995) (refers to pre-trial proceedings); MASS. GEN. LAWS ANN. ch. 278, § 16A (West 1996) (sex crimes and children under 18); MICH. COMP. LAWS ANN. § 600.2163a(10)(a), (12)(a) (West 1996); MINN. STAT. ANN. § 631.045 (West 1996) (sex crimes, children under 18); MISS. CONST. art. III, § 26 (sex crimes); NEV. REV. STAT. § 171.204 (1995) (for good cause); N.J. STAT. ANN. § 9:2-1 (West 1996) (in child custody proceedings with children under 16); N.J. R. OF CT. Rule 7:4-4 (West 1995) (sex crimes and domestic relations with defendant's consent); N.Y. JUD. LAW § 4 (McKinney 1996) (in divorce and other case and sex crimes); N.C. GEN. STAT. § 15-166 (1994) (sex crimes); N.D. CENT. CODE § 27-01-02 (1993) (scandalous or obscene material); S.C. CODE ANN. § 20-7-953 (Law Co-op. 1993) (child custody proceedings); S.D. CODIFIED LAWS § 23A-24-6 (Michie 1996) (sex crimes or minor); UTAH CODE ANN. § 78-7-4 (1996) (divorce and sex crimes); VT.

States Supreme Court in two cases addressing this issue, *Richmond Newspapers, Inc. v. Virginia*[33] and *Globe Newspaper Co. v. Superior Court*, which will be discussed in more detail shortly.[34] As Justice Burger noted in his dissent in *Globe*, "It would misrepresent the historical record to state that there is an 'unbroken, uncontradicted history' of open proceedings in cases involving the sexual abuse of minors."[35]

B. *Purposes Behind an Open Trial*

Ideally, an open trial serves the interests of the defendant as well as society as a whole. For the defendant an open legal proceeding[36] allows the public to assess whether the defendant is being treated fairly or being unjustly condemned.[37]

To that end, open trials help to ensure that witnesses testify truthfully,[38] because if an audience member realizes a witness is committing perjury, the audience member can reveal that information to the court.[39] Perjury is therefore discouraged

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STAT. ANN. tit. 12, § 1901 (1995) (scandalous and obscene material); VA. CODE ANN. § 18.2-67.8 (Michie 1993) (pertains to complaining witness during preliminary hearings); VA. CODE ANN. § 19.2-266 (Michie 1993) (during trials); WASH. REV. CODE ANN. § 13.34.110 (West 1996) (child custody proceedings); WIS. STAT. ANN. § 970.03 (4)(a) (West 1996) (sex crimes); WYO. STAT. ANN. § 14-6-224 (Michie 1996) (juveniles); 18 U.S.C. § 3509 (1997).

See also Globe, 457 U.S. at 608 n.22; Forman, *infra* note 249, at 443 n.45. Some of the circumstances for closing trials other than when a sex crime is charged or the witness is a child include—when the evidence is "vulgar" or it would "debauch the morals of the jury," *e.g.*, ALA. CODE § 12-21-202 (1996), or in order to protect a witness' safety, *e.g.*, CAL. PENAL CODE § 868.7 (West 1996), or to protect the defendant's right to a fair trial, *e.g.*, ARIZ. REV. STAT. R. CRIM PROC. 9.3.

33. 448 U.S. 555 (1980). *Richmond* gave the media a First Amendment right to attend criminal trials. *See infra* Part II.A.1.

34. 457 U.S. 596 (1982). *Globe* involved a challenge by the media of a state's request for closure. *See infra* Part II.A.1.

35. *Globe*, 457 U.S. at 614 (Burger, J., dissenting). Indeed, in at least one prior opinion the Court noted proceedings in which the courtroom had been closed while children and/or victims of sex crimes were testifying. *See* Gannett Co. v. DePasquale, 443 U.S. 368, 388 n.19 (1979).

36. The Sixth Amendment of the United States Constitution reads in pertinent part, "The accused shall enjoy the right to a speedy and public trial . . . ." U.S. CONST. amend. VI.

37. Waller v. Georgia, 467 U.S. 39, 46 (1984); *Richmond*, 448 U.S. at 569, 593 (Brennan, J., concurring); *Gannett*, 443 U.S. at 380; Estes v. Texas, 381 U.S. 532, 538-39 (1965); *In re* Oliver, 333 U.S. 257, 270-71 (1948); 1 T. COOLEY, A TREATISE ON CONSTITUTIONAL LIMITATIONS 647 (8th ed. 1927); 6 J. WIGMORE, EVIDENCE § 1834, at 438 (1940).

38. *Waller*, 467 U.S. at 46; *Richmond*, 448 U.S. at 569.

39. *Gannett*, 443 U.S. at 383; WIGMORE, *supra* note 37, at 435-36; NYU Note, *supra* note 22, at 1139.

because a witness confronted with such a risk may be less likely to lie.[40] Furthermore, an audience member may realize that she has additional information helpful to the case and can inform the parties.[41]

In addition, an open trial enhances the likelihood that attorneys and judges will execute their jobs properly.[42] By scrutinizing the proceedings, the public ensures that the defense attorney provides the best possible defense, the prosecutor properly advocates the people's case and the judge rules fairly on any objections, gives proper jury instructions and does not abuse judicial power. The public, in essence, serves as a check on the system.[43]

Open trials also educate the public about the workings of the criminal justice system,[44] promote the public's confidence in the system[45] and ensure the public that justice has prevailed.[46] These three purposes are interdependent: A public viewing a trial learns about judicial procedures.[47] If the trial proceeds fairly, the public gains confidence in the system because it is ensured that the system will protect and treat it and its families fairly. Moreover, when the public is outraged by a crime, a public trial can be an "outlet for community concern, hostility, and

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40. *Richmond*, 448 U.S. at 597; Vivian Berger, *Man's Trial, Women's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 89 (1977).

41. *Gannett*, 443 U.S. at 383; *Oliver*, 333 U.S. at 270 n.24; WIGMORE, *supra* note 37, at 332-33; Berger, *supra* note 40, at 89; NYU Note, *supra* note 22, at 1139.

42. *Waller*, 467 U.S. at 46; *Gannett*, 443 U.S. at 383; *Oliver*, 333 U.S. at 270; United States v. Sherlock, 865 F.2d 1069 (9th Cir. 1989), *amended and superseded by* 962 F.2d 1348 (1989); United States v. Hernandez, 608 F.2d 741 (9th Cir. 1979); WIGMORE, *supra* note 37, at 335; Berger, *supra* note 40, at 89; NYU Note, *supra* note 22, at 1139; Radin, *supra* note 13, at 394.

43. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982); *Richmond*, 448 U.S. at 569, 596 (Brennan, J., concurring); *Oliver*, 333 U.S. at 270-71; Nancy T. Gardner, Note, *Cameras in the Courtroom: Guidelines for State Criminal Trials*, 84 MICH. L. REV. 475, 492-93 (1985); Radin, *supra* note 13, at 394.

44. *Globe*, 457 U.S. at 606; *Richmond*, 448 U.S. at 571-72; WIGMORE, *supra* note 36, at 335; Berger, *supra* note 39, at 89; Gardner, *supra* note 42, at 492; NYU Note, *supra* note 21, at 1139. *Cf.* Radin, *supra* note 12, at 393-94.

45. *Globe*, 457 U.S. at 606; *Oliver*, 333 U.S. at 270; WIGMORE, *supra* note 36, at 335; Berger, *supra* note 39, at 89.

46. *Globe*, 457 U.S. at 606; *Richmond*, 448 U.S. at 571-72 & 594 (Brennan, J., concurring); *see also* Gardner, *supra* note 42, at 493; Radin, *supra* note 12, at 394.

47. Many authors question the amount the public does, and desires to, learn from watching a trial. For example, Radin, *supra* note 12, at 393, finds that it is ridiculous to think that people go to trials for education. The public only goes to trial, "when testimony is likely to contain obscene details or scandalous matters . . . " or to get an "emotional . . . [or] morbid stimulation . . . ." *Id.* Even if this characterization is accurate, attendance could nevertheless educate the public.

emotion."[48] Therefore, the public will be less likely to turn to vigilantism.[49] In sum, "[p]ublic scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole."[50]

C. *Further Concerns Regarding the Defendant's Rights*[51]

When discussing courtroom closure and the interests of a child victim-witness, two of the defendant's Sixth Amendment rights[52] are implicated—the right to confrontation and the right to an open trial. This Article deals only with the right to an open trial because courtroom closure does not implicate a defendant's right to confrontation.[53]

The defendant's Sixth Amendment right to an open and public trial is not absolute.[54] Accordingly, a defendant cannot demand open or closed legal proceedings.[55] There are different concerns, however, facing the criminal defendant which may lead the defendant to request closed or open proceedings. First, a defendant may object to a closed courtroom simply based on a constitutional right to an open trial which provides the previ-

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48. *Richmond*, 448 U.S. at 571; *see also* Press-Enterprise Co. v. Superior Court of Ca., 478 U.S. 1, 13 (1986) [hereinafter *Press II*]; Press-Enterprise Co. v. Superior Court of Ca., 464 U.S. 501, 509 (1984) [hereinafter *Press I*]; Gardner, *supra* note 43, at 493.

49. *Richmond*, 448 U.S. at 571. Arguably, the opposite occurred after the Rodney King verdict in California. The public, outraged by the crime committed, and expecting convictions of the police officers charged, rioted when the officers were acquitted. Hence, what the public viewed did not give it a sense of confidence and justice. In fact, it may have inflamed the public further. However, most likely, the majority of the public viewed only soundbites and not the entire trial. Accordingly, it is unclear whether the outcome would have been the same had the public viewed the entire trial.

50. *Globe*, 457 U.S. at 606.

51. Obviously, a defendant's Sixth Amendment rights are only implicated in a criminal proceeding, not in a child custody or other civil proceeding.

52. The Sixth Amendment reads in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . [and] to be confronted with the witnesses against him . . . ." U.S. CONST. amend VI. This applies to the states through the Fourteenth Amendment.

53. *See infra* note 250 and accompanying text; *infra* Part III.C.

54. Gannett v. DePasquale, 443 U.S. 368, 382 (1979); *infra* Part II.A.1.

55. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980) (discussing while a defendant can request closure, the defendant cannot compel it); *Gannett*, 443 U.S. at 382; BACKGROUND REPORT PREPARED FOR AND PRESENTED TO THE SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE COMM. ON THE JUDICIARY UNITED STATES SENATE, 94TH CONG., 2d SESS., FAIR TRIAL AND FREE EXPRESSION 25 (Comm. Print 1976) (defendant has no right to a private trial (citing Singer v. United States, 380 U.S. 24 (1965)), because his asserted rights conflict with those of the media). *See* discussion *infra* notes 86-106 and accompanying text.

ously discussed protections.[56] Second, closing a courtroom could imply to the jury that the child was traumatized, or a jury simply may be more likely to believe that child's testimony sensing that the child was traumatized. The criminal defendant wants to avoid these inferences.

On the other hand, a defendant may desire a closed proceeding. In this case, the child's and the defendant's motives are aligned to protect an equally important Sixth Amendment right to an impartial jury,[57] in which case, the defendant's interests and rights would be weighed solely against the First Amendment rights of the media.

II. MEDIA'S ACCESS TO COURTROOMS

A. *The Right to Attend Legal Proceedings*

1. *Supreme Court Cases.* Beginning in the early 1970s, the United States Supreme Court increasingly granted the media the right to gather,[58] and publish gathered information from le-

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56. *See supra* Part I.B.

57. This is an extremely important right for a defendant, which has been extensively litigated and commented upon and is not implicated by a child's interests in closing a courtroom. Briefly, the defendant's Sixth Amendment right to an impartial jury ensures a "fair trial." *See, e.g.*, Abraham Abramovsky, Moderator, *Impact of the Media on Fair Trial Rights: Panel on Media Access*, 3 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 291, 311 (1993) [hereinafter Symposium]. To ensure this right, a defendant might actually desire a closed courtroom in an attempt to prevent disclosure of information that might prevent a fair trial. *See* Gannett, 443 U.S. at 378 (citing Sheppard v. Maxwell, 384 U.S. 333 (1966) ("[The] Court has long recognized that adverse publicity can endanger the ability of a defendant to receive a fair trial.")); Irvin v. Dowd, 366 U.S. 717 (1961); Marshall v. United States, 360 U.S. 310 (1959); *see also* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 570 (1976); Rideau v. Louisiana, 373 U.S. 723 (1963); *see generally* Abraham Abramovsky, *Prejudicial Pre-trial Publicity*, N.Y. L.J., Apr. 5, 1993, at 3. For example, if jurors saw a news broadcast about the trial they were sitting on, they may be prejudiced by what they saw on television. *See* Symposium, *supra*, at 311 (speaker commenting on a *National Law Journal* article in which it was reported fifty percent of the jurors interviewed admitted to reading or watching media reports even though they had been instructed not to, including learning about inadmissible evidence). During the Symposium there was much debate regarding whether a defendant will ever be prejudiced by televising pre-trial proceedings or trials. The representatives of the media argue, with regard to pre-trial proceedings, that the attorneys can pick a jury that knows little or nothing about the case and that in fact a very small percentage of prospective jurors ever know what the case is about because "most people don't read all this good stuff." *Id.* at 303; *see also id.* at 293, 317, 310, 318-19. *But see* Abramovsky, *supra* ("jurors are prejudiced by the irresponsible publication of extrajudicial information . . .").

58. Branzburg v. Hayes, 408 U.S. 665 (1972); *see also* David N. Kuriyama, Note, *The "Right" of Information Triangle: A First Amendment Basis For Televising Judicial Proceedings*, 4 U. HAW. L. REV. 85, 109-10 (1982).

gal proceedings without sanction.[59] In response to these decisions, many lower courts closed courtrooms to prevent the media from gathering information that the court did not want published.[60] The Supreme Court did not prohibit this practice and instead seemed to affirm it in *Gannett Co. v. DePasquale*.[61] Analyzing the Sixth Amendment, the Court found that the right to an open trial belonged to a defendant,[62] and that the media had no independent right to attend a trial.[63] However, this general rule did not stand for long.

The Supreme Court's recognition of the media's right to attend criminal trials is a relatively recent development. One year after *Gannett*, the Court held in *Richmond Newspapers, Inc. v. Virginia*,[64] that the public, including the media, has a right to

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59. In 1976, the Court recognized the media's right to publish any information it gathered while in court. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); *see also* Oklahoma Publ'g Co. v. District Court, 430 U.S. 308 (1977); Fenner & Koley, *supra* note 3, at 415. Then in 1978, the Court held that once the media legally gathered information, it could publish it without sanction. *See* Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978); *see also* Fenner & Koley, *supra* note 3, at 415.

60. *See* Fenner & Koley, *supra* note 3, at 416.

61. 443 U.S. 368 (1979). In *Gannett*, three defendants were charged with second degree murder, robbery and grand larceny. The victim disappeared, and the defendants were initially unknown; therefore, publicity ensued. *Id.* at 371-75.

At a suppression hearing the defendants asked for closure because the adverse publicity would make a fair trial improbable. The People did not oppose the motion and it was granted. *Id.* The following day a reporter ("Petitioner") requested that the suppression hearing be open to the public. *Id.* The judge responded that the request was moot because the hearing had concluded. *Id.* Petitioner moved to set aside the exclusionary order. *Id.* A second hearing was held at which it was concluded that the media had a right to attend the hearing, but that right was outbalanced by the defendants' rights to a fair trial. *Id.* The New York Appellate Division, Fourth Department, vacated the order. *Id.* The New York Court of Appeals concluded that criminal trials were presumptively open but that in this case the defendants' rights overcame the presumption. *Id.* The exclusion was upheld. *Id.* The Supreme Court granted certiorari. *Id.* at 375-77.

62. *Gannett*, 443 U.S. at 379-82; *see also* Estes v. Texas, 381 U.S. 532, 538-39 (1965); *In re* Oliver, 333 U.S. 257, 270 (1948).

63. *Gannett*, 443 U.S. at 381-84; *see also* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 584-85 (1980) (Brennan, J., concurring).

64. 448 U.S. 555 (there was no opinion by the Court; however, seven judges recognized the right of the public to attend a criminal trial). In *Richmond*, the defendant, was indicted for the murder of a hotel manager found stabbed on December 2, 1975. *See id.* at 559-63 (discussing the defendant's trial and convictions of second degree murder in July, 1976). The Virginia Supreme Court reversed the conviction in October, 1977, because of improperly admitted evidence. *Id.* The retrial ended in a mistrial because no alternate juror was available to replace an excused juror. *Id.* The third trial also ended in a mistrial because a juror read about the defendant's previous trials. *Id.* The fourth trial began in September, 1978. The defendant asked that the trial be closed, the People did not object and the court closed the courtroom. *Id.* No objections were made at that time. Later that day, appellants, the reporters, requested a hearing to vacate the closure or-

attend a criminal trial,[65] founded not on the Sixth Amendment, which the *Gannett* Court addressed, but on the First Amendment.[66]

> We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment. Without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and "of the press could be eviscerated."[67]

The Court explained that *Richmond* was a case of first impression because the *Gannett* Court addressed only whether there was a right of access to pre-trial proceedings, not trials.[68] Furthermore, the *Richmond* Court noted that the *Gannett* Court did not address whether the media had a First Amendment right to attend a criminal trial.[69] Accordingly, the *Richmond* Court furthered the media's rights by finding that it had a First Amendment right to attend trials.

Two years later in *Globe Newspapers Co. v. Superior Court*,[70] the Court addressed courtroom closure and children vic-

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der. *Id.* The hearing was held and the appellants argued that the judge had to make findings and consider alternatives to closure before making a decision. *Id.* The appellants' motion was denied. At the conclusion of the People's case, the defendant moved for a mistrial and to strike the People's evidence. *Id.* The court sustained the motion to strike and found the defendant not guilty. *Id.* Appellants then intervened *nunc pro tunc* and petitioned the Virginia Supreme Court for writs of mandamus and prohibition and also filed an appeal of the closure order. *Id.* On July 9, 1979, the court dismissed the mandamus and prohibition petitions, and finding no reversible error, denied the petition for appeal. *Id.* The Supreme Court then granted certiorari. *Id.*

65. *See Richmond*, 448 U.S. at 580.

66. The First Amendment reads in pertinent part, "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I.

67. *Richmond*, 448 U.S. at 580 (quoting Branzburg v. Hayes, 408 U.S. 665, 681 (1977) (footnotes omitted)).

68. *Richmond*, 448 U.S. at 564.

69. *Id.*

70. 457 U.S. 596 (1982). In *Globe*, a Massachusetts statute required trials, for specific sexual offenses and involving victims under eighteen, to be closed to the media and public during the victim's testimony. *Id.* The defendant was tried for the rape of three girls, two aged sixteen and one aged seventeen. *Id.* The judge, pursuant to the statute, ordered the courtroom closed. *Id.* Petitioner, Globe, asked that the order be revoked and a hearing held. *Id.* The judge refused and Globe objected. *Id.* Globe then sought injunctive relief from a justice of the Supreme Judiciary Court. *Id.* Relief was denied. *Id.* Meanwhile the defendant was acquitted. *Id.* Globe then appealed to the full court. *Id.* The court dismissed the appeal, finding it was acceptable to close the courtroom during part of the trial. *Id.* On the issue of whether the media had a right to attend the trial, the court decided to wait for the Supreme Court to decide *Richmond*. *Id.* Globe appealed to the Supreme Court. *Id.* The Supreme Court vacated the judgment after *Richmond*, and remanded. *Id.* On remand, the Massachusetts Supreme Judiciary Court decided there was an exception to the "unbroken tradition of openness" when sex crimes and

tim-witnesses. The lower court in *Globe* followed a Massachusetts law[71] which required mandatory closure during criminal trials of sexual abuse of children under the age of eighteen. The media appealed the closure decision, challenging the law on First Amendment grounds. *Globe* did not involve a particularly sympathetic fact pattern for closure because the victims were sixteen and seventeen, they purportedly agreed to an open trial, and their names had already been released by the media.[72]

The Court held that while the media's right to attend a criminal trial established in *Richmond Newspapers*[73] was not absolute, the circumstances under which the media and public could be barred were limited.[74] In order to succeed on a request for closure and overcome the presumption of an open trial[75] the state must advance a compelling interest that is narrowly tailored to meet the interests the state is protecting.[76] Although the Court concluded that safeguarding the psychological well-being of a child was a compelling state interest, this interest alone did not justify mandatory closure. The Court ruled that decisions must be made on a case-by-case basis.[77]

The *Globe* Court never precluded closure, but simply dealt with the circumstances of a specific case. The Court stated,

> We emphasize that our holding is a narrow one: that a rule of mandatory closure respecting the testimony of minor sex victims is constitutionally infirm. In individual cases, and under appropriate circumstances, the First Amendment does not necessarily stand as a bar to the exclusion from the courtroom of the press and general public during the testimony of minor sex-offense victims. But a mandatory rule, requiring no particularized determinations in individual cases, is unconstitutional.[78]

Two years after *Globe*, the Court addressed the media's right to attend pre-trial proceedings, specifically the voir dire. In *Press-Enterprise Co. v. Superior Court (Press I)*,[79] the Court

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children are involved. *Id.* Globe appealed again and the Supreme Court granted certiorari. *Id.* at 598-602.

71. Mass. Gen. Laws, ch. 278, § 16A (1981).

72. *Globe*, 457 U.S. at 608-09.

73. 448 U.S. 555 (1980).

74. *Globe*, 457 U.S. at 606.

75. *Id.*

76. *Id.* at 606-07 (citing Brown v. Hartlage, 456 U.S. 45, 53-54 (1982); Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 101-03 (1979); NAACP v. Button, 371 U.S. 415, 438 (1963)).

77. *Id.* at 607-08.

78. *Id.* at 611 n.27.

79. 464 U.S. 501 (1984). In *Press I*, the defendant in the underlying action was tried and convicted of raping and murdering a teenage girl. *Id.* at 503. Before the trial, the media requested that the voir dire remain open to the public. *Id.* The prosecutor opposed

found that voir dire proceedings had enjoyed a presumption of openness in the past and, citing *Globe*, found that an overriding interest must be shown to allow closure.[80] Although the interests advanced—a defendant's right to a fair trial and a juror's right to privacy—were sufficient to warrant closure, there were no findings supporting the conclusion that an open proceeding would interfere with those rights.[81] Furthermore, the trial court failed to consider alternatives.[82]

Two years later in *Press-Enterprise Co. v. Superior Court* (*Press II*),[83] the Court put to rest any confusion over whether closure for pre-trial proceedings was to be treated differently than closure for trials. The Court found that as long as the proceeding, to which the media sought access, had historically been open to the public[84] and that "public access play[ed] a significant positive role in the functioning of the particular process in question,"[85] then a First Amendment right to attend the proceedings attached.[86]

The Court concluded that preliminary hearings were traditionally open to the public and that the hearings are sufficiently like a trial to conclude that the public played a positive role by attending.[87] Accordingly, there is a First Amendment right that attaches to attendance at a preliminary hearing.[88] The Court pointed out, however, that although a First Amendment right attached, this right is not absolute and must be weighed against

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the motion. *Id.* The judge held that the general voir dire would be open to the public and the individual voir dire would be closed. *Id.* The voir dire lasted for six weeks and only three days were open to the public. *Id.* After the selection of the jury the media requested the transcripts, but this request was denied. *Id.* at 503-04. After the defendant was convicted and sentenced, the media reapplied for the transcripts, and the request was once again denied. *Id.* The Court granted certiorari. *Id.* at 505.

80. *Press I*, 464 U.S. at 510.

81. *Id.* at 510-11.

82. *Id.* For example, the judge could have required each juror to make an affirmative request for an in camera hearing if they felt their answers were too personal for open court. *Id.* at 512.

83. 478 U.S. 1 (1986). In *Press II*, the defendant in the underlying action was charged with twelve counts of murder. *Id.* at 3. A preliminary hearing was held, and the defendant moved for closure. *Id.* The judge granted the unopposed motion citing prejudicial publicity. *Id.* at 4. The preliminary hearing continued for 41 days, resulting in the defendant being held to answer on all charges. *Id.* The media requested the transcripts, but this request was denied. *Id.* at 5. At some point during the appeals, the defendant waived his right to a jury trial and the transcript was released. *Id.*

84. *Press II*, 478 U.S. at 8.

85. *Id.*

86. *Id.* at 9.

87. *Id.* at 11-12.

88. *Id.* at 13.

the rights of the defendant.[89] But the Court found that no overriding interest was advanced to overcome this right, and the judgment was reversed.[90]

2. *Standards Used to Weigh Interests and Rights. Globe, Richmond, Press I* and *Press II* provided the lower courts with factors to consider when deciding whether to close courtrooms. The right to an open trial is a shared right of the public and the defendant[91] and protected by the First and Sixth Amendments respectively. To prevail on a closure motion the party must advance an overriding interest to overcome the presumption of openness.[92] Which rights are balanced depends on which trial participant—the state or the defendant—makes the motion for closure, and which participant challenges the motion—the state,[93] the defendant or the media.[94]

If the state or child moves to close the courtroom, and the media objects, then the media must establish a First Amendment right to attend the proceeding. Similarly, if the defendant moves for closure, and the media objects, it must establish a First Amendment right to be present, which the defendant may overcome.[95]

Specifically, there are several procedures for a court to follow when deciding whether to close a trial:

> The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.[96]

In other words, a court must find[97] that the state (or the

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89. *Id.*

90. *Id.* at 15.

91. *Id.* at 7.

92. An overriding interest must be presented whether the party is moving pursuant to the First or Sixth Amendments. *Id.* at 9-10; Waller v. Georgia, 467 U.S. 39, 47 (1984).

93. For these purposes the state represents the child's interests.

94. United States v. Doe, 63 F.3d 121, 128 (2d Cir. 1995).

95. The last possibility is that the state or child move for closure and only the defendant objects, in which case, a First Amendment right would not attach. The state or child must advance an overriding interest in light of the Sixth Amendment.

96. Press-Enterprise Co. v. Superior Court of Ca., 464 U.S. 501, 510 (1984); *see also Press II*, 478 U.S. at 9-10; *Waller*, 467 U.S. at 45; Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 382 (1979).

97. The judge's findings must support closure and be placed on the record. *See Press I*, 464 U.S. at 513; Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580-81 (1980); Herald Co. v. Klepfer, 734 F.2d 93 (2d Cir. 1984); People v. Kline, 494 N.W.2d 756 (Mich.

defendant)[98] have articulated an overriding interest that may be prejudiced,[99] that there are no alternatives,[100] and that the closure is narrowly tailored to the interest being protected.[101] In addition, the public must be notified, in advance, of the court's intention to partially or completely close the trial,[102] and the media must be given the opportunity, in a hearing, to challenge whether closure is proper. When children are involved, the trial judge is advised to look at the child's "age, psychological maturity and understanding, the nature of the crime, the desires of the victim, and the interests of parents and relatives."[103] Finally, many lower courts have concluded that when a court decides to only partially close[104] a trial, the standard to overcome the pre-

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Ct. App. 1992); Renkel v. State, 807 P.2d 1087 (Ala. Ct. App. 1991); State v. Klem, 438 N.W.2d 798 (N.D. 1989); State v. Suttles, No. CCA 76, 1987 WL 17248, *4 (Tenn. Crim. App. Sept. 21, 1987), *rev'd on other grounds*, 767 S.W.2d 403 (Tenn. 1989); State v. Hightower, 376 N.W.2d 648, 650 (Iowa Ct. App. 1985); *see generally* William K. Meyer, *Evaluating Court Closures After Richmond Newspapers: Using Sixth Amendment Standards to Enforce a First Amendment Right*, 50 GEO. WASH. L. REV. 304, 312 (1982) (discussing standards used to justify closure of trials).

98. It is unlikely the media will argue for a closed trial unless they were a party to the action.

99. *Waller*, 467 U.S. at 45; Globe Newspapers Co. v. Superior Court, 457 U.S. 596, 607 (1982) (citing Brown v. Hartlage, 456 U.S. 45, 53-54 (1982)); *Richmond*, 448 U.S. at 580-81; State v. Guajardo, 605 A.2d 217, 219-20 (N.H. 1992). In order for a defendant to overcome the presumption of openness he needs to show that there will be a reasonable likelihood of substantial prejudice. *Press II*, 478 U.S. at 14.

100. *Press II*, 478 U.S. at 14; *Press I*, 464 U.S. at 511; *Waller*, 467 U.S. 39; *Richmond*, 448 U.S. at 580-81; Woods v. Kuhlman, 977 F.2d. 74, 76-77 (2d Cir. 1992); United States v. Raffoul, 826 F.2d 218, 220 (3d Cir. 1987); *Herald Co.*, 734 F.2d 93; *Guajardo*, 605 A.2d at 220; Ostolaza v. Warden, 603 A.2d 768, 775 (Conn. App. Ct. 1992).

101. *See Waller*, 467 U.S. at 48; *Press I*, 464 U.S. at 510; *Globe*, 457 U.S. at 607; *Woods*, 977 F.2d at 77; United States v. Galloway, 963 F.2d 1388, 1390 (10th Cir. 1991); *In re* South Carolina Press Ass'n, 946 F.2d 1037, 1040 (4th Cir. 1991); United States v. Sherlock, 962 F.2d 1349, 1357 (9th Cir. 1989); CBS, Inc. v. U.S. Dist. Ct. for the Cent. Dist. of Cal., 765 F.2d 823, 825 (9th Cir. 1985); Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983); United States v. Jacobson, 785 F. Supp. 563, 568 (E.D. Va. 1992); United States v. Milken, 780 F. Supp. 123, 126 (S.D.N.Y. 1991); *Kline*, 494 N.W.2d at 759; *see* Suttles, 1987 WL 17248, at *5 (discussing a "limited and partial closing"); *cf. Globe*, 457 U.S. at 615 (Burger, J., dissenting) (suggesting that compelling government interests and narrow tailoring are inappropriate, rigid standards); *see also* Meyer, *supra* note 97, at 312-13 (discussing generally that closure orders are limited to the affected parties and portion of the proceeding); Symposium, *supra* note 57, at 297-98.

102. *See, e.g., Jacobson*, 785 F. Supp. at 566; *Raffoul*, 826 F.2d at 222; *Herald Co.*, 734 F.2d at 102.

103. *Globe*, 457 U.S. at 608.

104. Partial closure is either complete closure of the courtroom during only the victim-witness's testimony or complete closure to only certain members of the public, except for the defendant's family and the press. Complete closure is closure of the courtroom to every individual, except the witness, judge, jury, defendant, court officers and attorneys

sumption is lower, and thus a substantial state interest is sufficient.[105]

3. *Child Custody Proceedings.*[106] The Supreme Court has not ruled that First Amendment rights attach to child custody cases or family law proceedings. As there is no support for a finding that family court proceedings have been historically open to the public[107] nor that the public's presence plays any positive role by attending, no First Amendment right should attach. Furthermore, because the defendant's Sixth Amendment rights are no longer implicated, neither are the policies supporting the need for an open trial.[108] Moreover, family disputes, which are considered private matters, are involved.[109] Also, it should not be overlooked that although custody proceedings address the parental rights to children, there are often allegations of sexual and physical abuse, therefore, the concern regarding the effect on children of openly litigating their abuse still remains. Accordingly, the media should not be permitted to attend family court proceedings.

In New York, two court cases brought the issue of closure during family court proceedings to the forefront.[110] In *Matter of R.R, K.M., T.L., C.L., and R.L.*[111] and *Brentrup v. Culkin*,[112] the

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during the entire trial.

105. *United States v. Galloway*, 937 F.2d 542, 546 (10th Cir. 1991); *Sherlock*, 962 F.2d at 1357-58; *Wainwright*, 714 F.2d at 1539; *Kline*, 494 N.W.2d at 759-60. This conclusion is in accordance with the Court's statement that limitations on closure that resemble "time, place, and manner" do not require strict scrutiny. *Globe*, 457 U.S. at 607 n.17.

106. Access to family law proceedings varies from state to state. This Article will focus only on New York. Apparently, only in Florida are all family court proceedings open to the public. *See* Alan Findler, *Chief Judge in New York Opens Family Courts for Routine Cases*, N.Y. TIMES, June 16, 1997, at B7.

107. For example, in New York, the opposite is true. In 1922, the law provided that the public "may" be excluded from the courtroom. This language was changed to "shall" in the 1930s. *See* Gary Spencer, *Family Court Matters Open to the Public, Press*, N.Y. L.J., June 16, 1997, at 1. The language was once again amended to "may" in 1961, however, courts continued to close family court proceedings. *Id.*

108. *See supra* notes 35-50 and the accompanying text. Put simply, there is no longer a necessity that the public serve as a watch dog on the treatment of the defendant.

109. *See* Timothy M. Tippins, *Should Family Court Proceedings be Presumptively Open?*, STATE BAR NEWS, Sept./Oct. 1997, at 7 ("Intimate and often vile domestic detail is common fare in the Family Court . . . . [w]hy should our citizens lose all right to privacy simply because they bear the misfortune of domestic disharmony?").

110. The recent circumstances surrounding family court proceedings in New York also lend support to the concern that the media is increasingly gaining access to proceedings involving children.

111. N.Y. L.J., Dec. 13, 1995, at 30.

trial courts denied motions to close their courtrooms. Both decisions were appealed to the First Department of the New York Supreme Court, Appellate Division, and both trials were stayed pending those decisions.[113]

The *Matter of R.R.* involved the highly publicized case of Elisa Izquierdo, that brought New York City's entire child protective system under attack. Elisa was a six-year-old girl beaten to death by her mother, who had a history of abusive behavior towards her children. Elisa's mother pled guilty[114] and the *Matter of R.R.* addressed the child protective proceedings of Elisa's siblings. The decision to keep these proceedings open to the media was appealed. On appeal, the Appellate Division, First Department, reversed the lower court's ruling and barred the media from attending the family court proceedings.[115] Furthermore, the court allowed the children's lawyer to submit affidavits from the children, under seal, to substantiate the closure.[116]

Culkin involved the child custody dispute between Macaulay Culkin's parents. Macaulay is a child movie star featured in such movies as *Home Alone* and *The Good Son*. The proceeding addressed the custody of Macaulay and his five siblings, ages six through seventeen.[117] The guardian *ad litem*, appointed to represent the interests of the children, moved to have the proceedings closed to the public and the records sealed.[118] The parents joined in the request.[119] The lower court, although agreeing to seal the records, denied the request to close the proceedings finding that the parties had not shown that the children would be harmed.[120] Once again, the Appellate Division reversed the lower court's ruling.[121] The court based its decision on a statute permitting

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112. N.Y. L.J., Dec. 5, 1995, at 26 (citing Brentrup v. Culkin, 166 Misc.2d 870 (Sup. Ct. N.Y. County 1995), *rev'd*, 223 A.D.2d 294 (1st Dep't 1996)).

113. David A. Schulz & Carolyn K. Foley, *Child Protective Proceedings: Open To The Public?*, N.Y. L.J., Feb. 13, 1996, at S2.

114. John Sullivan, *Stepfather Is Sentenced to Prison in Abuse of Girl Who Later Died*, N.Y. TIMES, Oct. 30, 1996 at B3 (Elisa's stepfather pled guilty to attempted assault in the second degree for banging Elisa's head against a wall three weeks before her mother killed Elisa. The stepfather was sentenced to one and a half years in prison. Elisa's mother was sentenced to 15 years to life.).

115. Matter of Reben R., 641 N.Y.S.2d 621 (1st Dept. 1996)); Daniel Wise, *Hearing on Neglect Closed to Reporters*, N.Y. L.J., Apr. 24, 1996, at 1.

116. Wise, *supra* note 115.

117. Matter of P.B., N.Y. L.J., Sept. 23, 1996, at 25.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*; The Court of Appeals has refused to hear the appeal; accordingly the Appellate Division's decision stands. *Court of Appeals Refuses to Hear Culkin Case*, N.Y.

closure, and several affidavits provided to the court by psychologists and school officials involved with the children, showing that the children would suffer from the exposure.[122] Furthermore, the court found there was no reasonable justification for this type of proceeding to be open to the media, other than curiosity and media ratings.

Subsequent to these two cases, however, New York's top state court officials declared that Family Court must be open to the media and the public.[123] Although statutorily family court matters were already open to the public, courts had consistently kept them closed.[124] Accordingly, the officials adopted new rules[125] that allow closure only when warranted to protect children from harm.[126] Practically speaking, although the courtroom is intended to be open, as the two examples demonstrate, judges will continue to close courtrooms when children could be harmed or their privacy interests are implicated.

B. *The Right to Televise Legal Proceedings?*[127]

Although the print media has a right to attend legal proceedings, this right does not, and should not, extend to the presence of cameras in the courtroom.

Recently, the landscape of statutes permitting cameras in the courtroom has changed. In 1965, 48 states had statutes or court rules precluding cameras in the courtroom[128] whereas today, Court TV has access to courtrooms in 47 states.[129] This has

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L.J. Feb. 7, 1997.

122. Matter of P.B., N.Y. L.J., Sept. 23, 1996, at 25.

123. Alan Finder, *Chief Judge in New York Opens Family Courts for Routine Cases*, N.Y. TIMES, June 19, 1997, at 1; Gary Spencer, *Family Court Matters Open to Public, Press*, N.P. L.J., June 19, 1997, at 1.

124. Spencer, supra note 123, at 1.

125. *Id.*

126. *Id.*

127. For a history of televising trials see Chandler v. Florida, 449 U.S. 560 (1981); Carolyn Stewart Dyer & Nancy R. Hauserman, *Electronic Coverage of the Courts: Exception to Exposure*, 75 GEO. L.J. 1633 (1987); Richard P. Lindsey, *An Assessment of the Use of Cameras in State and Federal Courts*, 18 GA. L. REV. 389 (1984); Carolyn E. Reimer, *Television Coverage of Trials: Constitutional Protection Against Absolute Denial of Access in the Absence of a Compelling Right*, 30 VILL. L. REV. 1267 (1985); Shartel, *supra* note 4; David N. Kuriyama, Note, *The "Right" of Information Triangle: A First Amendment Basis for Televising Judicial Proceedings*, 4 U. HAW. L. REV. 85 (1982).

128. Estes v. Texas, 381 U.S. 532, 544 (1965); Larry V. Starcher, *Cameras in the Courtroom—A Revival in West Virginia and the Nation*, 84 W. VA. L. REV. 267, 269 (1982).

129. Shartel, *supra* note 4; Robert G. Morillo, *Television and the Public Trial*, N.Y. L.J., Apr. 1, 1997, at 3; Massimo Calabresi, *Swaying the Home Jury*, TIME, Jan. 10, 1994,

led to a surge in the number of televised trials, including many high-profile trials such as the Menendez, Bobbitt, William Kennedy Smith, Louise Woodward and O.J. Simpson trials. Even foreign countries have requested video of some of these trials, presumably to televise it.[130] As this trend toward televising trials continues, the question of closure becomes increasingly important as the American public is able to see a variety of trials at any time, resulting in both negative and positive effects.

1. *Landscape of the Law Regarding Televising Trials.* In 1981, in *Chandler v. Florida*, the United States Supreme Court failed to recognize a right to televise trials.[131] However, noting the many safeguards Florida enacted to protect the defendant and other witnesses, the Court stated it would not intervene[132] in a State's decision to allow cameras in courtrooms.

Prior to *Chandler*, the photographic and radio media were excluded from both federal and state courtrooms.[133] At that time, most states had adopted the American Bar Association's ("ABA") Canon 35 excluding the media,[134] which was amended in 1952 to

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at 56.

Court T.V. has its own self-policing guidelines—it does not broadcast testimony of a witness less than twelve years old or if the material involves personal matters, like child abuse. Pate, *infra* note 137, at 357. However, Court T.V. has televised a trial involving a twelve-year-old boy in a divorce case. *Id.* at 357-58. To determine what it televises, "[s]everal factors are considered . . . . They include: how important and interesting the issues in the case are; the newsworthiness of the case and the people involved; the quality and educational value of the trial, and the expected length of the trial. *See Court TV Website,* Feb. 1, 1998, <http://www.courtly.com/about/ctvfaq.html> (on file with the author and the *Buffalo Law Review*).

130. *Entertainment Tonight*, Jan. 10, 1994, reported that Switzerland, Germany and Italy have requested television footage of the Bobbitt trial.

131. Chandler v. Florida, 449 U.S. 560, 573 (1981) (the Court concluded that *Estes* never "announced . . . a constitutional rule barring still photographic, radio, and television coverage in all cases under all circumstances"). *See also Estes*, 381 U.S. at 539-40 (the First Amendment does not provide the media with the right to televise a trial because the media interferes with the defendant's right to due process and a fair trial); United States v. Edwards, 785 F.2d 1293 (5th Cir. 1986); United States v. Kerley, 753 F.2d 617 (7th Cir. 1985); Westmoreland v. CBS, Inc., 752 F.2d 16 (2d Cir. 1984); United States v. Hastings, 695 F.2d 1278 (11th Cir. 1983); United States v. Torres, 602 F. Supp. 1458 (N.D. Ill. 1985).

132. *Chandler*, 449 U.S. at 576-77.

133. *See* Starcher, *supra* note 128, at 267-69 (explaining the exclusion applied to all state courts except Colorado and Texas).

134. *Id.* The Canon originally read:

> Proceedings in the court should be conducted with fitting dignity and decorum. The taking of photographs in the courtroom, during sessions of the court or recesses between sessions, and the broadcasting of court proceedings are calculated to detract from the essential dignity of the proceedings, degrade the court

exclude cameras, from the courtroom. Canon 3A(7) (which is a renamed version of Canon 35), was amended in 1982 to permit television coverage in the judge's discretion.[135] Then in 1990, the Canon was deleted altogether, because the ABA concluded the Canon did not address ethical issues.[136] By that time, most states had adopted statutes allowing cameras in the courtroom.[137] Although federal courts are statutorily prohibited from

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and create misconceptions with respect thereto in the mind of the public and should not be permitted.

Id.

135. *Id.*

A judge should prohibit broadcasting, televising, recording or photographing in courtrooms and areas immediately adjacent thereto during session of court, or recesses between sessions, except that under rules prescribed by a supervising appellate court or other appropriate authority, a judge may authorize broadcasting, televising, recording or photographing of judicial proceedings in courtrooms and areas immediately adjacent thereto consistent with the right of the parties to a fair trial and subject to express conditions, limitations and guidelines which allow such coverage in a manner that will be unobtrusive, will not distract the trial participants, and will not otherwise interfere with the administration of justice.

Id. See also WARREN FREEDMAN, PRESS AND MEDIA ACCESS TO THE CRIMINAL COURTROOM 48 (1988); Strickland & Moore, *supra* note 13, at 133.

136. Kathe Aschenbrenner Pate, Comment, *Restricting Electronic Media Coverage of Child-Witnesses: A Proposed Rule*, 1993 U. CHI. LEGAL F. 347, 352 (1993).

137. In January, 1977, three states permitted cameras in the courtroom. By 1981, thirty-four states allowed cameras. Starcher, *supra* note 128, at 267-69. Now, forty-seven states allow cameras in the courtroom. Robert G. Morrillo, *Television and the Public Trial*, N.Y. L.J., Apr. 1, 1997, at 3; Massimo Calabresi, *Swaying the Home Jury*, TIME, Jan. 10, 1994, at 56; Strickland & Moore, *supra* note 13, at 133. The statutes are as follows: ALA. CANONS OF JUD. ETHICS, Canon 3(A)(7) (1996); ALASKA RULES GOVERNING THE ADMINISTRATION OF ALL CTS. Rule 50 (1997); ARIZ. SUP. CT. RULES Rule 81, Canon 3(A)(7) (1997); *In re* Arkansas Bar Ass'n, 609 S.W.2d 28, 30 (1980); CAL. GEN. RULES APPLICABLE TO ALL CTS. 980 (Aug. 1, 1997); COLO. CODE OF JUD. CONDUCT Canon 3(A)(7) (1990); CONN. CODE OF JUD. CONDUCT Canon 3(A)(7) (1997); DEL. JUDGES' CODE OF JUD. CONDUCT Canon 3(A)(7) (1997); FLA. CODE OF JUD. CONDUCT Canon 3(A)(7) (1994); GA. UNIFORM SUPER. CT. RULES Rule 22 (1997); HAW. SUP. CT. RULE 5.1-5.2, *published in* R. OF SUP. CT. OF HAW. vol. 2, at 26 (1987); IDAHO CODE OF JUD. CONDUCT Canon 3(A)(7) (1997); ILL. SUP. CT. RULES Rule 63, Canon 3(A)(7) (1997); IOWA CODE OF JUD. CONDUCT Canon 3(A)(7) (1996); KAN. CODE OF JUD. CONDUCT Canon 3(A)(7) (1997); KY. SUP. CT. RULES Rule 4.300, Canon 3A(7) (1997); LA. CODE OF JUD. CONDUCT Canon 3(A)(9) (1997); ME. RULES OF COURT *Administrative Order in Regard to Photographic and Electronic Coverage of the Courts*, 66 A.2d XXV (1982); MD. RULES Rule 16-109 (1997); MASS. RULES OF THE SUP. JUD. CT. Rule 3:09, Canon 3(A)(7) (1997); MICH. CODE OF JUD. CONDUCT Canon 3(A)(7) (1997); MINN. CODE OF JUD. CONDUCT Canon 3(A)(7) (1997); *In re* Canon 35, 176 Mont. xxiii (1978); NEB. SUP. CT. RULES 8.1-.3 (1986); NEV. SUP. CT. RULES Part IV, Rules 229-247 (1997); N.H. SUP. CT. RULES Rule 19 (1997); N.H. SUPER. CT. RULES, Rule 78 (1994); N.H. DIST. & MUN. CT. RULES Rule 1.4 (1995); N.J. CODE OF JUD. CONDUCT Canon 3(A)(9) (1997); N.M. SUP. CT. GEN. RULES Rule 23-107 (1997); N.Y. RULES OF THE CHIEF JUDGE §§ 29.1-.4 (1997); N.C. GEN. RULES OF PRACTICE FOR THE SUPER. AND DIST. COURTS Rule 15 (1997);

allowing cameras in courtrooms during criminal trials, civil trials are not covered by statute and each circuit is permitted to adopt Local Rules addressing this issue.[138]

2. *Are There Advantages to Allowing Cameras in the Courtroom?* One frequently advanced reason to support cameras in the courtroom is their ability to replace the public's presence in the courtroom, because, arguably, the public does not attend trials as frequently as in the past.[139] Recall that many of the protections provided by an open trial require the public's presence.[140] On one hand, however, it is not necessary for the television media to broadcast a trial in order to inform the public. After all, the media may report what it can access,[141] and it usually has complete access to the trial records.[142] Accordingly,

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N.D. ADMINISTRATIVE RULES AND ORDERS Rule 21 (1996); N.D. RULES OF CRIM. PROCEDURE Rule 53 (1996); N.D. RULES OF COURT Rule 10.1 (1996); RULES OF PRACTICE OF THE SUP. CT. OF OHIO RULES Rule 17 (1997); RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO Rules 11-12 (1997); OKLA. CODE OF JUD. CONDUCT Canon 3(A)(7) (1997); OR. UNIFORM TRIAL CT. RULES 3.180 (1997); PA. CODE OF JUD. CONDUCT Canon 3(A)(7) (1997); R.I. SUP. CT. RULES Article VII (1997); TENN. SUP. CT. RULES Rule 10, Canon 3(A)(7) (1995); TEX. LOCAL RULES OF THE CT. OF APPEALS Rule IX (1997); UTAH RULES OF JUD. ADMINISTRATION Rule 4-401 (1997); VT. RULES OF APPELLATE PROCEDURE Rule 35 (1988); VA. RULES OF CT. CRIMINAL PROCEDURE § 19.2-266 (1996); WASH. RULES OF GEN. APPLICATION Rule 16 (1996); WIS. SUP. CT. RULES 61.02-.12 (1996); WYO. RULES OF CRIMINAL PROCEDURE Rule 53 (1996). *See* Dyer & Hauserman, *supra* note 127.

138. *See supra* note 4.

139. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572 (1980) ("attendance at court is no longer a widespread pastime"). There are contradictory views regarding the proper role of the media now that the public does not attend criminal trials with any frequency or consistency. It is established that the right to attend a criminal trial is not simply the media's right but the public's right; in fact the press has no greater right to attend a trial than the public. *See* Estes v. Texas, 381 U.S. 532, 584 (1965) (Warren, C.J., concurring). The ideal situation is to have the public attend the trial in order to fulfill the intended purposes of an open trial. *See supra* Part I.B. Some courts find that the media is not supposed to take on the role of the public and attend the trial in lieu of the public. *See* United States v. Torres, 602 F. Supp. 1458, 1463 (N.D. Ill. 1989); Commonwealth v. Contakos, 453 A.2d 578 (Pa. 1982). *Cf.* Douglas v. Wainwright, 714 F.2d 1532, 1542-43 (11th Cir. 1983); People v. Holveck, 565 N.E.2d 919 (Ill. 1990). However, there is support in the United States Supreme Court for the notion that the media should act as a "surrogate for the public." *Richmond*, 448 U.S. at 573. The public does not have the time in this modern age to attend trials; therefore, the media should attend them and inform the public of what it is missing, so as to "give meaning to those explicit guarantees" such as ensuring the defendant is not unjustly condemned. *Id.* at 575; *see also* Freedman, *supra* note 135, at 12.

140. *See supra*, Part I.B.

141. Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).

142. Globe Newspapers Co. v. Superior Court, 457 U.S. 596, 615 (1982) (Burger, J., dissenting).

because attendance at trials does not give the media any additional information,[143] it serves no purpose by attending.

On the other hand, ideally, broadcasting trials could serve some of the purposes and provide some of the protections of an open trial.[144] For example, the viewer could judge the witness's demeanor and credibility. Similarly, television would provide the forum whereby viewers are alerted to the testimony of a witness so that if the testimony is false the viewer can come forward and inform the court;[145] or any viewer having additional information about that trial can come forward.[146] Viewers can also observe the judge and attorneys to ensure that they are performing their jobs adequately.[147] By watching, viewers become more educated as to the workings of the judicial system[148] and ideally their confidence in the system increases.[149] Finally, through television the public is ensured that justice is done.[150]

However, in reality, broadcasting trials does not fulfill these purposes and may even result in negative effects. As opposed to viewing a trial in a courtroom, viewers only see what the camera sees; they are subject to what is seen through the camera's lens and how it is seen, including through close-ups, shots from different angles or only one angle. Hence, unable to view all the participants at the same time or any one participant continuously, viewers are not equipped to judge a witness's demeanor, or the actions of the judge and attorneys.

Moreover, it is likely that in most cases the television net-

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143. Critics have remarked that the television media wants access to courtrooms solely to increase its ratings. Television stations are usually interested only in the most heinous crimes or those trials where celebrities or public officials are involved. This is why the term "media circus" is often employed. *See* Chandler v. Florida, 449 U.S. 560 (1981) (trials are televised not to educate but to "titillate"); SUSANNA BARBER, NEWS CAMERAS IN THE COURTROOM: A FREE PRESS—FREE TRIAL DEBATE 33 (1987); The Honorable Alfred T. Goodwin, *Preface* to SUSANNA BARBER, NEWS CAMERAS IN THE COURTROOM: A FREE PRESS—FAIR TRIAL DEBATE ix, x (1987); Hearn, *supra* note 24; Pate, *supra* note 136, at 348; Radin, *supra* note 13; Steven Keeva, *Circus-Like Trial Colors Expectation*, A.B.A. J., Nov. 1995, at 48c; Henry J. Reske, *Courtroom Cameras Face New Scrutiny*, A.B.A. J., Nov. 1995, at 48d; Floyd Abrams & Wendy Kaminer, *Cameras in the Courtroom*, A.B.A. J., Sept. 1995, at 36-37.

144. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572-73 (1980); *cf.* Symposium, *supra* note 56, at 293.

145. *See supra* notes 38-40.

146. *See supra* note 41 and accompanying text.

147. *See supra* notes 42-43 and accompanying text.

148. *See supra* notes 44-47 and accompanying text; Gregory K. McCall, *Cameras in the Criminal Courtroom: A Sixth Amendment Analysis*, 85 COLUM. L. REV. 1546, 1559-60 (1985).

149. *See* discussion *supra* text accompanying notes 44-50.

150. *See* discussion *supra* text accompanying notes 44-50.

work will broadcast only parts of the trial,[151] or simply soundbites. Thus, once again, viewers are unable to judge the witnesses' credibility and demeanor or ensure that the judge and attorneys are doing their jobs. Therefore, viewers cannot determine whether the defendant was given a fair trial. Accordingly, the public's confidence and sense that justice is served may not improve. In fact, these sentiments may be harmed as the public may conclude, based on the brief parts it saw, that justice was not served. In addition, if viewers do not see the whole trial, the education received about the judicial system is minimal.[152]

Finally, if only those trials that involve morbid details or celebrities are televised, the viewer will not be educated as to the entire system. Because the television media often broadcasts programs for the ratings it predicts will result, this is a likely possibility.[153] Critics argue convincingly that the television media does not televise trials to ensure the protections of an open trial or to educate the public.[154] If a viewer did watch an entire trial, as was envisioned by the ideal of open trials, televising trials may, at least, provide education, and at most, the protections of open trials. However, in light of the reality of televised trials and the negative effects it may have, cameras serve little purpose in the courtroom.

3. *The Impact of Television on Legal Proceedings.*[155] In addition to the negative impact televised trials can have on the

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151. Critics of television in the courts note that because of time constraints, "gavel to gavel" coverage is virtually unworkable. They suggest that, except for trials which possess extraordinary voyeuristic appeal, coverage is economicall [sic] uninviting. Whatever may be the reasons, it does appear that even in the states where cameras are permitted in the courtrooms, the public sees little of the product on the evening news.

Goodwin, *supra* note 143.

152. Some authors conclude that due to the minimal coverage there is no real education to be gained from televising trials. Gardner, *supra* note 43, at 491 (in *Chandler v. Florida*, 449 U.S. 560 (1981) only 2 minutes and 55 seconds were ever played on television).

153. The Honorable Robert M. Takasugi, *Jury Selection in a High-Profile Case*: United States v. Delorean, 40 AM. U. L. REV. 837, 837 (1991); Bill Carter, *Watching the Watchers*, N.Y. TIMES, Mar. 10, 1997, at D1.

154. *See supra* note 151; Carter, *supra* note 153 (the revenues received by television networks to support their programming "are directly linked to the numbers of viewers that stations, networks and cable channels can reliably produce."). Therefore, networks and other channels must broadcast programming that will attract viewers if they want to survive financially.

155. This Section relies on studies and conclusions in BARBER, *supra* note 143, as the most comprehensive and recent research done in this area. *See also* Norbert L. Kerr,

public, television may also have a negative impact on the trial participants. The Supreme Court first addressed television's impact on courtroom proceedings in *Estes v. Texas*.[156] The Court concluded that the impact of cameras on the participants in the courtroom and on the fairness of the proceedings, deprived the defendant of due process.[157]

First, the *Estes* Court found that the presence of television cameras could adversely impact the jury.[158] Jurors, aware of the broadcast, may feel that they are judging a more important trial, leading to the possibility of prejudice, and pressure to decide the case the way the public advocates.[159] Although one researcher notes that "[n]early [fifty percent of the jury] said cameras made the case seem more important"[160] she concludes that jurors are generally unaware of the camera's presence and, therefore, this concern is unfounded.[161]

The *Estes* Court further found that jurors could become preoccupied with how they look and appear,[162] and therefore more interested in knowing when the camera is viewing them than with hearing the testimony. This, in turn, affects the verdict and the fairness of the trial.[163] Not only has one researcher concluded that this concern is unfounded,[164] but this possibility can be alleviated, as in the O.J. Simpson case, by precluding the jury from being taped.

According to the *Estes* Court, the jurors may also disobey the court's directions and watch the broadcast on television.[165] This is problematic because if a juror reviews only portions of the trial, those portions that are rebroadcast would be reempha-

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The Effects of Pretrial Publicity on Jurors, JUDICATURE, Nov.-Dec. 1994, at 120-27 (citing Carroll & Kerr, et al., *Free Press & Fair Trial: The Role of Behavioral Research*, 10 LAW & HUM. BEHAV. 187-202 (1986)).

156. 381 U.S. 532 (1965).

157. *Id.* at 535.

158. *Id.* at 545.

159. *Id.*; *see also* Lindsey, *supra* note 127, at 404-05.

160. BARBER, *supra* note 143, at 73.

161. BARBER, *supra* note 143, at 72-73.

162. *Estes*, 381 U.S. at 546.

163. *Id.*

164. Barber cites several results: between fifty percent and seventy percent of the jurors surveyed said they were not distracted. Although fifty percent of the jurors were aware of the media, seventy-five percent said they did not feel self-conscious, and eighty percent said they were able to concentrate. BARBER, *supra* note 143, at 73.

165. *Estes*, 381 U.S. at 546; Goodwin, *supra* note 143; Lindsey, *supra* note 127, at 404; Symposium, *supra* note 57, at 293; *see also* Walter Goodman, *Court TV: Case of the Curious Witness*, N.Y. TIMES, July 21, 1997, at C15 (mistrial declared when witness admitted to viewing another witness's testimony on Court TV, prior to testifying).

sized to the juror.[166] The juror might then place more importance on those portions.[167] In addition, due to the publicity of a televised trial, jurors may be more interested in writing about their experience than concentrating on the defendant.

Finally, retrials would be affected if there was wide publicity of a trial.[168] In highly publicized cases, it might be very difficult to find a juror who did not hear of or see testimony from the previous trial, as evidenced by the retrial of the Menendez brothers.

Witnesses also may be impacted by a televised trial[169] and like the jury, react inappropriately to being filmed. The witness could become "demoralized," "frightened," "cocky," "embarrassed," or tend to "overdramatize."[170] Any such feelings would affect the accuracy of the testimony.[171] Moreover, the camera's presence may affect the witness's demeanor.[172] The witness may feel nervous and therefore look nervous. The jury may then question the witness's credibility and disregard the testimony.[173] Once again, this may lead to a deprivation of the defendant's constitutional right to a fair trial.[174] On the other hand, if a witness knows there is a larger audience this may reduce the possibility of perjury.

The witness might also watch portions of the trial on television before testifying.[175] This could affect the witness's testimony, or in some cases, a decision not to testify at all.[176] The witness may fear being "ostracized" by the community as a result of testifying,[177] or the witness may learn that evidence will be used to impeach the witness.[178] If the evidence is something the witness does not want revealed to the community, the wit-

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166. Goodwin, *supra* note 143; Lindsey, *supra* note 127, at 405.

167. *Estes*, 381 U.S. at 546; *but see* Matthew T. Crosson, *Cameras in the Courtrooms Do Not Adversely Affect Conduct of Court Proceedings*, N.Y. L.J., May 1, 1991, at 40 (if jurors do disobey the court's instructions it is better that they see the coverage of the trial on television than read a reporter's interpretation of what occurred at the trial).

168. *Estes*, 381 U.S. at 546.

169. *Id.* at 547.

170. *Id.*

171. McCall, *supra* note 148, at 1552.

172. *Id.* at 1552-55.

173. *Id.* at 1554.

174. FREEDMAN, *supra* note 135, at 49; McCall, *supra* note 148, at 1552, 1555.

175. *Estes*, 381 U.S. at 547; *see also* Symposium, *supra* note 57, at 294; Abraham Abramovsky, *Gag Orders and Prior Restraint*, N.Y. L.J., May 6, 1993, at 3; Goodman, *supra* note 165.

176. *Estes*, 381 U.S. at 547; FREEDMAN, *supra* note 135, at 49.

177. McCall, *supra* note 148, at 1553.

178. *Id.* at 1554.

ness may decide not to testify.[179] These circumstances may affect not only the witness who already agreed to testify but also the potential witness.[180] Once again a defendant's right to a fair trial would be compromised.

Indeed, one researcher found that witnesses are most adversely affected by televised trials; "[w]itnesses had mixed, often negative attitudes toward camera coverage."[181] The study showed three quarters of the witnesses were intimidated,[182] eighty percent of the witnesses were aware of the camera, and between seventy-one percent and forty-seven percent were slightly or somewhat self-conscious.[183] Between forty-seven percent and forty-three percent were nervous, and fifty-nine percent felt the presence of the media exaggerated the importance of the case.[184] The study also found that seventy-three percent of the witnesses said they were not reluctant to testify even knowing that the camera was present.[185] Forty to fifty percent of the attorneys said that the cameras affected their witnesses.[186]

Moreover, the *Estes* Court found the judge could be subject to many of the same pressures as the jury and witnesses, particularly an elected judge.[187] The judge might feel publicly pressured to rule a particular way. The judge could also be distracted and unable to hear portions of the testimony.[188] It would be increasingly difficult for the judge to ensure that the defendant received a fair trial, due to distractions and possibilities of prejudice.[189] The judge may also have increased administrative burdens.[190] Furthermore, it may become difficult to keep control

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179. *Id.*
180. *Id.*; *see also* Gardner, *supra* note 43, at 488.
181. BARBER, *supra* note 143, at 74.
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.* at 75.
187. Estes v. Texas, 381 U.S. 532, 548 (1965).
188. *Id.*
189. *Id.*
190. *See* Gardner, *supra* note 43, at 490-91 (extra burdens such as hearings regarding the media and special attention to the procedural issues of the case). *See also* Takasugi, *supra* note 153, at 838-40, where the judge in the *United States v. DeLorean* case described the extra administrative procedures he implemented in order to ensure that the defendant received a fair trial, including: a continuance to allow press interest to wane, forming a committee with media representatives, making rules with the committee about where the media would sit and how they would behave, providing an auxiliary room where the media would conjugate, giving the parties additional peremptory challenges, liberally excusing jurors for cause, constantly telling the jurors not to watch anything about the trial on television or to read anything in the newspapers and meet-

of the trial with people entering, exiting and moving around the courtroom.[191]

One researcher concluded that judges generally are unaffected by the cameras, often forgetting about their presence.[192] Some judges said they were actually encouraged to perform better[193] and others said it made judges better prepared.[194] It is interesting to note that even though judges were either neutral or happy about the presence of cameras, only about fifty percent wanted coverage to continue.[195] Their "lack of enthusiasm was partly due to annoyance about additional supervisory duties, congested hallways, and extra time and taxpayers' money associated with camera coverage."[196]

In addition, the defendant could be affected. Some argue televising the trial is akin to harassing the defendant; the "presence [of television] is a form of mental—if not physical—harassment . . . ."[197] Televising a defendant's every move strips the defendant of his dignity.[198] The cameras could also distract the defendant from concentrating on the case.[199] The defendant's counsel might also be distracted, resulting in a less effective defense.[200] Although lawyers often act and play to a jury, there is the possibility that counsel might enhance this role,[201] caring more about television appearances and attracting new clients than about the defendant. In addition, the camera's presence singles out the defendant on trial from all the other defendants in the system, causing further prejudice.[202] Finally, as noted, any negative effects on any trial participants may prejudice the defendant.

Additionally, the presence of television cameras detracts from the dignity of the trial.[203] "The sense of fairness, dignity and integrity that all associate with the courtroom would be-

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ing with jurors after the trial to tell them what to expect from the press.

191. Takasugi, *supra* note 153, at 838.

192. BARBER, *supra* note 143, at 75.

193. *Id.*

194. *See* Shartel, *supra* note 4 at 23.

195. BARBER, *supra* note 143, at 76.

196. *Id.*

197. Estes v. Texas, 381 U.S. 532, 549 (1965).

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id. But see* Chandler v. Florida, 449 U.S. 560, 580-81 (1981), where the Court stated that more experimentation was required before this point could be substantiated.

203. *Estes*, 381 U.S. at 565 (Warren, C.J., concurring); *cf.* BARBER, *supra* note 143, at 36-37.

come lost with its commercialization."[204]

In 1981, the Court once again addressed the issue of cameras in the courtroom in *Chandler v. Florida*,[205] voicing its skepticism of the *Estes* Court's conclusions regarding the severity of the psychological impact on the trial participants.[206] The *Chandler* Court concluded that evidence suggesting a psychological impact on the participants of the trial was sparse[207] and that further research was required.[208]

Although the degree of the impact of television on trial participants and the system has been questioned, the above shows there is undoubtedly an impact on some of the participants which should outweigh any advantages of broadcasting a trial, including those trials involving children.

III. COURTROOM CLOSURE IS AN OPTION NECESSARY TO PROTECT THE INTERESTS OF THE CHILD

A. *Potential Harm to Children Who Testify*

Child abuse is a serious and growing problem in our country. In 1974, 60,000 cases of child abuse were reported, which number increased to 1.1 million in 1980 and more than doubled to 2.4 million in the 1980s.[209] From 1986 to 1993, "confirmed incidents of abuse and neglect" once again doubled.[210] Serious physical abuse increased four hundred percent over those same years.[211] According to one study twenty-five per cent of all girls

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204. *Estes*, 381 U.S. at 574.

205. 449 U.S. 560 (1981).

206. *Id.* at 578. The Court acknowledged that if psychological impact can be proven, then a ban on television cameras in the courtroom is necessary. *Id.* at 575.

207. In addition to the aforementioned reasons to exclude cameras from the courtroom, another reason advanced by the *Estes* Court was the impact of the technology on the participants. The *Estes* Court found that the increase in noise and lights in the courtroom might distract the jury. *Estes*, 381 U.S. at 546. The validity of this concern is seriously questioned due to technological advances made in the television industry since the *Estes* decision. *See Chandler*, 449 U.S. at 576, BARBER, *supra* note 144, at 25, 36. Often, courtrooms have facilities which require only one camera and one microphone, reducing any distractions. *Id.* at 36.

208. *Chandler*, 449 U.S. at 575-76 & n.11. The studies in this area are still sparse and inconclusive.

209. The Honorable Charles D. Gill, *Essay on the Status of the American Child, 2000 A.D.: Chattel or Constitutionally Protected Child-Citizen, in* CHILD TRAUMA I 3, 14-15 (Ann Wolbert Burgess, ed., 1992).

210. Joe Sexton, *Child Abuse Kills Fewer in New York*, N.Y. TIMES, Oct. 10, 1996 at B1 (citing a study released in 1996 by the United States Department of Health and Human Services).

211. *Id.*

will be sexually abused before age eighteen,[212] and these statistics are for a crime that remains largely unreported.[213]

Child abuse victims suffer a "variety of long term emotional, behavioral, social and sexual problems," including headaches, sleep disorders, depression, suicide attempts and drug abuse.[214] Many sex abuse victims are also beaten and psychologically threatened.[215] These problems can lead to "severe psychological harm" if a child is forced to testify in front of an abuser and the public.[216] The entire trial process, including "insensitive interac-

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212. Christine A. Grant, *Sexually Exploiting Children: Assessing Competency to Testify, in* CHILD TRAUMA I 3, *supra* note 209, at 213. Another study shows that the prevalence of child abuse has risen anywhere between 6% and 62% for girls, and between 3% and 31% for boys. *Id.*

213. *Id.* at 214; Ann Wolbert Burgess, *Introduction* to CHILD TRAUMA I, *supra* note 209, at xv; Susan Howell Evans, Note, *Criminal Procedure—Closed Circuit Television in Child Sexual Abuse Cases: Keeping the Balance Between Realism and Idealism*—Maryland v. Craig, 26 WAKE FOREST L. REV. 471, 477 (1991). Other statistics include: "[b]etween 1976 and 1985, the reported incidence of sex abuse per 10,000 children skyrocketed from less than 1% to 17.9%." *Id.* at 476 & n.57. One out of every three female adults is sexually abused as a child. *Id.* at 476 & n.58. Finally, only 24% of the reported crime of child sexual abuse result in criminal action. *Id.* at 477 & n.63; *see also* Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806 (1985) [hereinafter Harvard Note].

Death from child abuse is also increasing. Sexton, *supra* note 204 (describing a decrease in death from child abuse in New York which is "counter to the trend nationwide"). "Across the country, child-abuse fatalities increased by almost forty percent from 1985 to 1991, according to the National Committee to Prevent Child Abuse, and have held roughly steady since then at about 1,250 a year." *Id.*

214. Burgess, *supra* note 213, at xv.

215. Susan J. Kelley, *Stress Responses of Children and Parents to Sexual Abuse and Ritualistic Abuse in Day Care Centers, in* CHILD TRAUMA I, *supra* note 209, at 231, 251.

216. Susan Cohn, Note, *Protecting Child Rape Victims From the Public and Press After* Globe Newspaper Co. *and* Cox Broadcasting, 51 GEO. WASH. L. REV. 269, 269 & nn.2-3 (1983). See DAVID FINKELHOR, CHILD SEXUAL ABUSE 188-99 (1984) for a discussion of the extent of psychological trauma suffered by children. "That some children have long-term reactions to childhood sexual victimization has never really been in dispute. Clinical experience is rich in this regard." *Id.* at 196. *See* ROBERT L. GEISER, HIDDEN VICTIMS 26-31 (Beacon Press 1979); Arthur S. Frumkin, *The First Amendment and Mandatory Courtroom Closure in* Globe Newspaper Co. v. Superior Court: *The Press' Right, the Child Rape Victim's Plight*, 11 HASTINGS CONST. L.Q. 637, 642 (1984) (closing trials can lessen the trauma suffered while leaving them open can create additional trauma). For a discussion of studies regarding the extent to which children subject to testifying are psychologically damaged, see David Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 977, 979-86 & nn.7-35 (1969). Libai states that the study of a child's trauma is difficult due to the number of factors that may cause the child to suffer trauma and the different reactions of independent children. Testifying in an open courtroom, cross examination and facing the defendant can be factors leading to increased trauma. *Id.* at 984. *See also* Lucy Berlesser, *The Child Witness: The Progress and Emerging Limitations*, 40 U. MIAMI L. REV. 167 (1986); Gail S. Goodman & Vicki S. Helgeson, *Child Sexual Assault: Children's*

tions, poor interviewing techniques and mismanagement of cases,"[217] by all those involved including prosecutors, social workers and police officers, often causes a slower recovery and/or further trauma;[218] in fact, the trial is often referred to as a second rape.[219] Frequently, the child is left feeling embarrassed, ashamed and/or guilty.[220]

Televising a trial would produce further damage to child witnesses,[221] as the child potentially finds herself testifying to the world. The child's friends could see the trial and talk to the child about the trial, possibly increasing the trauma.[222] In addition, anyone could record the trial, which would be available to view when the victim grew older. The result may be fewer children coming forward to report crimes against them for fear that they will have to tell their story to the world,[223] or be subject to taunts in the playground.[224] Even many of those who advocate televising trials recommend an exception for children.[225] An abused child should be left with dignity both in childhood and later in life.

In addition, a child's right to privacy is implicated when addressing publication and broadcasting of a trial.[226] Although a

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Memory and the Law, 40 U. MIAMI L. REV. 181 (1985); Michael H. Graham, *Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions*, 40 U. MIAMI L. REV. 19 (1985).

217. Grant, *supra* note 212, at 214; *see also* Josephine A. Bulkley, *Evidentiary and Procedural Trends in State Legislation and Other Emerging Legal Issues in Child Sexual Abuse Cases*, 89 DICK. L. REV. 645, 645-46 (1985).

218. Grant, *supra* note 212, at 214; Libai, *supra* note 215, at 982.

219. *See, e.g.*, Frumkin, *supra* note 216, at 637 & n.3.

220. *See* Burgess, *supra* note 213, at xv; Berger, *supra* note 40, at 88.

221. *See* BARBER, *supra* note 143; Tippins, *supra* note 109, at 7 ("public exposure itself may etch additional scars on the psyche of the victim.").

222. "Suddenly, this child's life makes the front page of the papers and is on the six o'clock news. That could be very harmful to the child." Alan Finder, *Chief Judge in New York Opens Family Courts for Routine Cases*, N.Y. TIMES, June 16, 1997, at B7 (quoting Jane M. Spinak, head of the juvenile rights division of the Legal Aid Society of New York); Tippins, *supra* note 108, at 7 ("An abused child, not to mention his or her schoolmates, may well hear the intimate details of his or her life discussed on the evening news or, perhaps, on the Jerry Springer show or one of the other TV tabloids.").

223. "[T]he prospect of exposure has impelled some victims to conclude that their private hell is less threatening than the public exposure." Timothy M. Tippins, *supra* note 108, at 7.

224. The author is not suggesting that rape is something of which to be ashamed. However, many victims blame themselves or feel ashamed. Burgess, *supra* note 213; Cohn, *supra* note 216, at 281. The author is simply suggesting that these feelings should not be compounded by a televised trial.

225. *See* Chandler v. Florida, 449 U.S. 560, 576-77 (1981); BARBER, *supra* note 143, at 27.

226. Julian Grant, Note, *Victims, Offenders and Other Children: A Right to Pri-*

full discussion of this right exceeds the scope of this Article, victims have a legitimate privacy interest in prohibiting the publication of their names and faces in newspapers and on television.[227] Some child victims may even fear publication more than testifying in front of the defendant. Closure can facilitate displacement of this fear. When a courtroom is closed, the court can control the information the media accesses.[228] Accordingly, the court can delete the child's name from transcripts if they are released to the media.[229] In fact, this is the most efficient way to deal with the issue, while at the same time allowing the media to disseminate other information. However, unless statutes are passed requiring deletion, or courts are more willing to delete names from transcripts, children must rely on the media for protection. Furthermore, closure is particularly useful in a situation where the media discloses a name or a picture before a motion for closure can be made, or before a trial actually begins. Under these circumstances, there is no way to protect a child's remaining privacy interest, other than to close a trial. Privacy issues also take on a unique slant when children are involved because children must rely on third parties to act in their best interests.

The treatment of child victims, including their privacy rights, is particularly perplexing when compared with the protections afforded juvenile defendants.[230] For example, juveniles'

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vacy?, 19 AM. J. CRIM. L. 485, 496 (1992).

227. *See generally* Deborah W. Denno, *Perspectives on Disclosing Rape Victims' Names From the Privacy Rights of Rape Victims in the Media and the Law*, 61 FORDHAM L. REV. 1113 (1993) (essay providing the arguments for and against publishing rape victims' names in the press); Suzanne M. Leone, *Protecting Rape Victims' Identities: Balance Between the Right to Privacy and the First Amendment*, 27 NEW ENG. L. REV. 883 (1993).

228. Once the media obtains the materials they are free to publish it with out punishment. *See supra* Part II.A.1.

229. *See* Cohn, *supra* note 216, at 284. This is one way to protect a child's privacy without having to rely on the media to do so.

230. *See* FREEDMAN, *supra* note 135, at 32-35; Frumkin, *supra* note 216, at 637 & n.2; Cohn, *supra* note 216, at 279-81. One article provides several examples of the protections afforded the juvenile defendant. Libai, *supra* note 216, at 977. For example, they are interviewed by special police officers, the trials are heard in separate and different courtrooms from those of adults, their cases are heard by different judges and their proceedings are less formal. *Id.* Their records are also sealed.

In New York, the Attorney General's Office has proposed a revision of the laws regarding juvenile offenders. In particular a revision of the confidentiality standards is proposed. The proposals include turning over all records of offenders ages 16-18 to the local district attorney and allowing fingerprinting and photographing of juveniles charged with a felony. Gary Spencer, *Vacco Urges Crackdown of Juvenile Offenders*, N.Y. L.J., May 29, 1996, at 1-2. Recently, the Governor of the State, George Pataki, took on

identities are shielded from the press and public,[231] and media access to their adjudicatory proceedings is often denied.[232] The juvenile defendants' records are sealed so that the offender avoids public scrutiny and has the opportunity to start down the "lawful path."[233] The child victim-witness should receive comparable protections.[234]

Laws regulating closure should consider child custody proceedings as well. Approximately half of the marriages in this country end in divorce,[235] resulting in the possibility that many children are left to be provided for by one parent. Although children can be severely affected by the divorce,[236] they can be further traumatized by the ensuing legal proceedings.[237]

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proposals, including tougher sentences, which were approved by the New York State Senate. *Today's News: Update*, N.Y. L.J. Feb. 14, 1997, at 1.

231. *See* Sally M. Keenan, Comment, Globe Newspaper Co. v. Superior Court, 11 HOFSTRA L. REV. 1353, 1361 (1983). Although media entities often impose self-regulation on the publishing of rape victims' names, they are not required to do so. Only three states have statutes ensuring that victims' names will not be published. *See* Denno, *supra* note 227; Cohn, *supra* note 216, at 279 & n.78.

232. *In re* Oliver, 333 U.S. 257, 266 n.12 (1948); Austin Daily Herald v. Mork, 507 N.W.2d 854 (Minn. App. 1993); *In re* Minor, 563 N.E.2d 1069, *aff'd*, 595 N.E.2d 1052 (Ill. 1992); *In re* T.R., 556 N.E.2d 439 (Ohio 1990); *In re* Hughes County, 452 N.W.2d 128 (S.D. 1990); *In re* N.H.B., 769 P.2d 844 (Utah App. 1989); Associated Press v. Bradshaw, 410 N.W.2d 577 (S.D. 1987); *see also* Cohn, *supra* note 216, at 279; Note, *The Public Right of Access to Juvenile Delinquency Hearings*, 81 MICH. L. REV. 1540 (1983). Most states mandate closed juvenile defendant proceedings but give discretion to the judge to open the proceeding to certain interested parties. Other states allow the judges to close the proceedings upon their discretion. *Id.* at 1540-41 & n.3.

233. Cohn, *supra* note 216, at 279-80.

234. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 611 (1982) (Burger, J., dissenting); Cohn, *supra* note 216, at 279-80. There have been several suggestions for ways to decrease the trauma suffered by children victim-witnesses. One of the most interesting, but least discussed suggestions, is a separate courtroom, essentially a "child-courtroom," constructed to accommodate the child while preserving the rights of the accused. The courtroom could have fewer seats, be smaller and provide a more relaxing atmosphere. The child would be able to see only the judge, the prosecutor, the defense counsel and the child examiner. The jury, the accused and the audience would be behind a special mirror. It should be noted that placing the accused behind a mirror would be problematic, as it would implicate the defendant's right to confrontation under the Sixth Amendment. *See supra* Part III.C and accompanying footnotes. *See also* Libai, *supra* note 215, at 1014-18; Keenan, *supra* note 230, at 1376-78.

235. *See, e.g.*, Lee E. Teitelbaum, *Divorce, Custody, Gender, and the Limits of the Law: On Dividing the Child*, 92 MICH. L. REV. 1808, 1808 (1994).

236. "If there is one thing about which virtually everyone interested in divorce and custody would agree, it is that this process involves, and perhaps creates, the most deeply antagonistic relations suffered by humans in modern society." Teitelbaum, *supra* note 235, at 1816.

237. It is unclear how many couples must use the resources of the courts to resolve their differences. *Id.* at 1817. However, if they do need the court's intervention, it is

The discretion to close courtrooms under these circumstances is even more persuasive because the Sixth Amendment rights of a defendant are not implicated. Furthermore, because divorce and custody involve private matters, courts and legislatures should be more willing to consider privacy arguments when deciding whether to close courtrooms.[238]

B. *The State's Interest in Protecting Children*

The state also has an interest in protecting a victim-witness, and therefore, often takes the role of child advocate. First, states have an interest in protecting the psychological well-being of a child victim-witness by protecting the child from further trauma, embarrassment and humiliation that might arise in the course of an open trial.[239]

Second, the state has an interest in enhancing "the likelihood of credible testimony from such minors, free of confusion, fright, or embellishment."[240] If a child testifies in front of a live audience, or television cameras, there is a risk that the child will be fearful and therefore incapable of giving a complete and accurate account of the abuse. There is also the possibility that the child will be unable to testify at all.[241] Alternatively, a child might see a large audience and think that it will be necessary to embellish the testimony to gain credibility.

Third, the state has an interest in "preserv[ing] evidence and obtain[ing] just convictions."[242] In many child abuse cases the child is the only witness.[243] If the child is unable to testify or is unable to give an accurate account, the prosecutor will be unable to obtain a conviction.[244]

Fourth, the state has an interest in encouraging future victims of sex crimes to come forward.[245] A child who knows of hu-

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likely they have reached a point where they are highly antagonistic towards each other. Furthermore, in a case which involves celebrity parents there is a greater likelihood that the media is interested in attending the proceeding.

238. *See supra* Part II.A.3.

239. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982).

240. Globe Newspaper Co. v. Superior Court, 423 N.E.2d 773, 779 (Mass. 1981), *rev'd*, 457 U.S. 596 (1982).

241. Frumkin, *supra* note 216, at 643.

242. *Globe*, 423 N.E.2d at 779.

243. *See* Evans, *supra* note 213, at 493; Harvard Note, *supra* note 213.

244. Evans, *supra* note 213, at 493; *see* Brian L. Schwalb, *Child Abuse Trials and the Confrontation of Traumatized Witnesses: Defining "Confrontation" To Protect Both Children and Defendants*, 26 HARV. C.R.-C.L. L. REV. 185, 195 (1991).

245. *Globe*, 457 U.S. at 607. The Supreme Court found that this was not a compelling state interest because the state advanced no empirical evidence to support the con-

miliation that another witness suffered while testifying in open court might be less willing to come forward for fear of being subject to the same treatment.[246] Finally, the state has an interest in deterring the possibility that potential or repeat offenders will seek out people labelled as victims as easy targets.[247]

C. *Protections For Children Other Than Closure*

Many proposals, other than closure, have been advanced to protect child victim-witnesses from emotional harm. These include screens, videotaped testimony and closed circuit television.[248] However, because many of these alternatives conflict with the defendant's Sixth Amendment right to confrontation,[249] courts' decisions on their use have been unpredictable. While the United States Supreme Court has not permitted the use of screens,[250] it has permitted the use of closed circuit television.[251]

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tention that victims would not come forward if they knew they would have to testify in open court. *Id.* at 610. However, there is data showing that victims are discouraged from coming forward due to the treatment of previous victims who have reported crimes of abuse and rape. *See, e.g.*, Cohn, *supra* note 216, at 269 & n.4.

246. Cohn, *supra* note 216, at 269 & n.4.

247. *See* Grant, *supra* note 226, at 496.

248. Bulkley, *supra* note 216; Ellen Forman, *To Keep the Balance True: The Case of* Coy v. Iowa, 40 HASTINGS L.J. 437, 443 n.45 (1989); Keenan, *supra* note 231, at 1353.

249. The Sixth Amendment reads, in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. CONST. amend. VI.

A defendant has a right to confront those people who testify against him. By removing the child from the courtroom or placing an obstruction between the child and the defendant, the defendant can no longer confront the child-witness. As stated above, this right is not implicated when the courtroom is closed. Beyond this brief description, and due to the complexity of the defendant's confrontation rights, any insightful discussion of these alternatives is beyond the scope of this Article. *See generally* Bulkley, *supra* note 217, at 658-64; George Andre Fields, Maryland v. Craig: *Suffering Children to Testify Via Closed Circuit Television*, 35 HOW. L.J. 285, 288-95 (1992); Katherine A. Francis, *To Hide in Plain Sight: Child Abuse, Closed Circuit Television, and the Confrontation Clause*, 60 U. CINN. L. REV. 827, 830-42 (1992); John Paul Serketich, Note, *A Conflict of Interests: The Constitutionality of Closed-Circuit Television in Child Sexual Abuse Cases*, 27 VAL. U. L. REV. 217 (1992).

250. Coy v. Iowa, 487 U.S. 1012 (1988). *Cf.* United States v. Lucas, 932 F.2d 1210 (8th Cir. 1991) (court allowed a screen to be placed between the defendant and a testifying undercover police officer).

251. Maryland v. Craig, 497 U.S. 836, 852 (1990). Several states have statutes allowing closed circuit television. The following list includes those statutes that allow either one-way or two-way closed circuit television. ALA. CODE § 15-25-3 (Supp. 1993); ALASKA STAT. ANN. § 12.45.046 (Michie 1993); ARIZ. REV. STAT. ANN. §§ 13-4251, 13-4253(A) (West 1993); CAL. PENAL CODE § 1347 (West Supp. 1994); CONN. GEN. STAT. ANN. § 54-86g (West 1993); DEL. CODE ANN. tit. 11, § 3514 (1993); FLA. STAT. ANN. § 92.54 (West 1993); GA. CODE ANN. § 17-8-55 (Supp. 1993); HAW. REV. STAT., § 626, R. EVID. 616

The case law regarding the use of videotape is split,[252] although there is a substantial number of states that permit videotaped testimony of children to be used at trial.[253]

The alternatives reflect attempts by legislatures and scholars to protect victim-witnesses; yet, many of them do not provide the advantages of courtroom closure. First, these alterna-

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(Michie 1993); IDAHO CODE § 19-3024A (1993); IND. CODE ANN. § 35-37-4-8 (West 1994); IOWA CODE ANN. § 910A.14 (West 1993); KAN. STAT. ANN. § 22-3434(a)(1) (1992); KY. REV. STAT. ANN. §§ 421.350(1), (3) (Michie 1993); LA. REV. STAT. ANN. art. 15:283 (West 1993); MD. ANN. CODE art. 27, § 774 (1996); MASS. GEN. LAWS. ANN. ch. 278, § 16D (West 1993); MICH. COMP. LAWS ANN. § 600.2163a (12)(a) (West 1993); MINN. STAT. ANN. § 595.02(4) (West 1994); MISS. CODE ANN. § 13-1-405 (Supp. 1991); N.J. STAT. ANN. § 2A:84A-32.4 (West 1994); N.Y. CRIM. PROC. LAW §§ 65.00-65.30 (McKinney 1993); OHIO REV. CODE ANN. § 2907.41(C), (E) (Anderson 1992); OKLA. STAT. ANN. tit. 22, § 753(B) (West 1994); OR. REV. STAT. § 40.460(24) (1992); PA. CONS. STAT. ANN. tit. 42, §§ 5982, 5985 (West 1994); R.I. GEN. LAWS § 11-37-13.2 (1994); S.C. CODE ANN. § 16-3-1530(G) (Law Co-op. 1991); S.D. CODIFIED LAWS ANN. §§ 26-8A-30 to 26-8A-31 (Michie 1993); TEX. CODE CRIM. PROC. ANN. art. 38.071 § 3 (West 1994); UTAH R. CRIM. PROC. 15.5 (1992); VT. R. EVID. 807(d); VA. CODE ANN. § 18.2-67.9 (Michie 1993); WASH. REV. CODE ANN. § 9A.44.150 (West 1993). The Illinois Supreme Court has held that closed-circuit television violates the defendant's state right to confrontation. Stephanie B. Goldberg, *The Children's Hour*, A.B.A. J., May 1994, at 89. *See also* Forman, *supra* note 247, at 445 n.52; Jean Montoya, *On Truth and Shielding in Child Abuse Trials*, 43 HASTINGS L.J. 1259, 1260 nn.4-5 (1992).

252. *Compare* Commonwealth v. Bizzaro, 535 A.2d 1130 (Pa. Super. 1987) *with* State v. Taylor, 562 A.2d 445 (R.I. 1989).

253. ALA. CODE § 15-25-2 (1993); ARIZ. REV. STAT. ANN. §§ 13-4251, 13-4253(B), (C) (West 1993); ARK. CODE ANN. § 16-44-203 (Michie 1993); CAL. PENAL CODE § 1346 (West Supp. 1994); COLO. REV. STAT. ANN. §§ 18-3-413, 18-6-401.3 (West 1990); CONN. GEN. STAT. ANN. § 54-86g (West Supp. 1993); DEL. CODE ANN. tit. 11, § 3511 (1993); FLA. STAT. ANN. § 92.53 (West Supp. 1993); HAW. REV. STAT. § 626, R. Evid. 616 (Michie 1993); IDAHO CODE § 19-3024A (Michie 1993); IND. CODE §§ 35-37-4-8(c), (d), (f), (g) (West 1994); IOWA CODE ANN. § 910A.14 (West Supp. 1993); KAN. STAT. ANN. § 22-3434(a)(2) (1992); KY. REV. STAT. ANN. § 421.350(4) (Michie 1993); ME. REV. STAT. ANN. tit. 15, § 1205 (1993); MASS. GEN. LAWS. ANN., ch. 278, § 16D (West 1993); MICH. COMP. LAWS ANN. § 600.2163a (West 1993); MINN. STAT. ANN. § 595.02(4) (West 1994); MISS. CODE ANN. § 13-1-407 (Supp. 1991); MO. STAT. §§ 491.675-491.690 (West 1996); MONT. CODE ANN. §§ 46-15-402 to 46-15-403 (1993); NEB. REV. STAT. § 29-1926 (1992); NEV. REV. STAT. § 174.227 (Michie 1993); N.H. REV. STAT. ANN. § 517:13-a (Supp. 1991); N.M. STAT. ANN. § 30-9-17 (1993); OHIO REV. CODE ANN. §§ 2907.41(A), (B), (D), (E) (Anderson 1992); OKLA. STAT. tit. 22, § 753(C) (West 1994); OR. REV. STAT. §40.460 (24) (1992); PA. CONS. STAT. ANN. tit. 42, §§ 5982, 5984 (West 1994); R.I. GEN. LAWS ANN. § 11-37-13.1 (1993); S.C. CODE ANN. § 16-3-1530(G) (1991); S.D. CODIFIED LAWS ANN. § 23A-12-9 (1993); TENN. CODE ANN. §§ 24-7-116(d), (e), (f) (1993); TEX. CODE CRIM. PROC. ANN. art. 38.071, § 4 (Vernon 1994); UTAH R. CRIM. PROC. RULE 15.5 (Michie 1993); VA. CODE § 18.2-67 (Michie 1993); VT. R. EVID. 807(d) (1992); WIS. STAT. ANN. §§ 967.04 (7)-(10) (West 1993); WYO. STAT. § 7-11-408 (1993); 18 U.S.C. § 3509 (1988). *See Craig*, 497 U.S. at 853; Forman, *supra* note 248, at 441 n.26; Montoya, *supra* note 251, at 1260 n.3; *see also* Kee MacFarlane, *Diagnostic Evaluations and the Use of Videotapes in Child Sexual Abuse Cases*, 40 U. MIAMI L. REV. 135 (1985-1986).

tives may not help the child concerned about privacy, because although the child testifies from a separate room, the testimony is broadcast to the courtroom for the jurors.[254] Second, many of the alternatives involve a conflict with the defendant's Sixth Amendment right of confrontation.[255] For example, when testimony is videotaped in a separate room, or a child testifies via closed circuit television, the defendant is precluded from "confronting" the accuser. Third, although closed circuit television has been approved by the Supreme Court and goes far to protect victims,[256] both it and videotaped testimony can distort what the jury sees.[257] For example, the jury may not see the child's facial expressions and gestures,[258] or the camera may focus on the child's whole body or just the face, or the camera may move around or remain still while the victim is testifying. Furthermore, the jury will see only the victim, not the prosecutor or defense attorney, limiting their view of the process.[259] When the courtroom is closed, these issues are avoided. Courtroom closure protects children from further psychological trauma, without implicating the defendant's right to confrontation, and allowing the jury to view the entire process. Thus, it should remain a viable option in today's world of television-mania.

CONCLUSION

It is practically indisputable that children suffer from testifying during legal proceedings. Furthermore, in child abuse cases, children are often the only witnesses without whose testimony wrong-doers may escape punishment. Moreover, due to the stigma society places on sexual issues, our system should make every effort to facilitate children's testimony without additional emotional trauma, at the time of testifying and into the future.

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254. Cohn, *supra* note 216, at 276-77. Accordingly, when the testimony is transported to the courtroom or played in the courtroom, the media would see it and be able to broadcast the victim's testimony. The victim who knows this may be just as traumatized as one who testifies in the courtroom.

255. *Id.* Closed circuit television is the exception, due to the Supreme Court's ruling in *Maryland v. Craig*, 497 U.S. 836 (1990).

256. Closed circuit television protects many victims from potential harm. The victim, testifying from another room, does not face the spectators in the courtroom or the defendant. She testifies from a more comfortable atmosphere which may make her more relaxed and her testimony more accurate. *But see supra* note 254.

257. Cohn, *supra* note 216, at 276-77; Schwalb, *supra* note 244, at 200.

258. *Id.*

259. *Id.* For example, Schwalb notes that when the victim turns to look at someone else in the room the jury will have no idea at whom the victim is looking. *Id.*

In light of these concerns, why should the child's trauma be increased by spectators, or publicity, for the sake of the media's presence? There is no legitimate supportable reason. Although the United States Supreme Court has given the media the right to attend trials, it is not an absolute right. Because the media's overriding concern in attending legal proceedings appears to be to report morbid details in order to receive high ratings, the media's interest does not outweigh the interest in protecting the psychological well-being of children. In addition, the media does not serve as an appropriate substitute for public attendance at legal proceedings which would otherwise ensure that the purposes of open proceedings are served. Furthermore, because the media can obtain all pertinent and newsworthy information through transcripts,[260] nothing further, that is truly newsworthy, is gained from attendance; therefore, the barring of media for the whole proceeding is an appropriate measure taken to ensure the protection of children.

However, many courts are not willing, in the face of rising media coverage, to completely bar the media from a courtroom. Accordingly, most courts permit representatives of the media and the defendant's family to remain[261] or permit closure only during the victim's testimony.[262] These tactics allow courts to split the baby—provide a more comfortable environment for the child, yet ensure there can be no allegation of a "secret" trial.[263]

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260. When the media has not learned of and has not printed the child's name, transcripts may be released with the child's name deleted. This allows the media to print information they gain that society wishes to know. However, where the media has already ascertained and printed a child's name the transcripts should not be released. In that instance, the media already knows who they are reporting about and for some victims the damage is done. In child custody cases transcripts should not be released.

261. *In re* Oliver, 333 U.S. 257, 272 & n.29 (1948); United States v. Galloway, 963 F.2d 1388 (10th Cir. 1992); United States v. Sherlock, 962 F.2d 1349 (9th Cir. 1989); Douglas v. Wainwright, 714 F.2d 1532, 1539 (11th Cir. 1983); Fayerweather v. Moran, 749 F. Supp. 43 (D.R.I. 1990); United States *ex rel.* Morgan v. Lane, 705 F. Supp. 410, 411 (N.D. Ill. 1989), *aff'd*, 897 F.2d 531 (7th Cir. 1990); People v. Bensen, 621 N.E.2d 981 (Ill. App. 1993); People v. Holveck, 524 N.E.2d 1073 (Ill. App. 1988), *aff'd*, 565 N.E.2d 919 (Ill. 1990); State v. Klem, 438 N.W.2d 798 (N.D. 1989); State v. Suttles, Civ. No. 1987 WL 17248 (Tenn. Crim. App. Sept. 21, 1987).

262. It appears that after *Globe*, courts have not employed complete closure, i.e., closing the whole trial to all the public, as a solution to a child's psychological trauma.

263. Secret trials are described as a method of oppression and are one of the reasons our system has a presumption of openness. *See* Estes v. Texas, 381 U.S. 532, 539 (1965); *Oliver*, 333 U.S. at 268-70; *see also* discussion *supra* Part I.A.

One author has suggested the following rule:

> In criminal, juvenile, and civil proceedings, electronic media coverage of a witness under the age of eighteen in the courtroom or its immediate environs is prohibited. The testimony of the witness shall not be photographed, recorded,

The exclusion of the media, and the necessity for standards when children are involved, is particularly pressing when the discussion turns to the television media. Courts have been increasingly willing to allow cameras in the courtroom and there is a growing sentiment to accept the presence of cameras in the courtroom. Although currently the television media does not have a First Amendment right to televise trials, this status may not continue. Most states permit cameras in courtrooms and many do not have exceptions for proceedings involving children. Furthermore, in the past, exceptions to the presumption of openness for trials involving sex crimes existed. This fact has been ignored. Accordingly, although there has never been a presumption allowing the television media in the courtroom during criminal trials involving child victim-witnesses or child custody proceedings,[264] this could also be ignored. To avoid this outcome, access of the television media to courtrooms should be limited.

To avoid further trauma to children, courts, at a minimum, must be given and must use their power to exclude all the media during at least the child victim-witness's testimony. Courts should also be willing to close child custody proceedings in their entirety. Legislatures must pass laws precluding the televising of children's testimony and of entire child custody proceedings. In a situation where a child is suffering trauma, will suffer trauma, or will be unable to testify coherently in an open courtroom, the balance of interests should shift away from allowing the media to televise the trial, to protecting children. In the end, the child's interests must prevail.

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or broadcast. Attendance by the electronic media and print media shall be permitted at the discretion of the presiding judge.

Pate, *supra* note 136, at 367.

264. For example, Floyd Abrams commented in discussing a recent decision in the Southern District of New York permitting cameras in a civil trial that, "cameras should routinely be admitted in the courtroom." Deborah Pines, *TV Cameras Allowed in U.S. Court*, N.Y. L.J., May 1, 1996, at 1. Increased television coverage of places where coverage was usually denied will invariably force courts to consider the issues herein.